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Supreme Court, U.S.
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No. 97-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

vs.

ERIC CLEMMONS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A CLAIM IS "FAIRLY PRESENTED" TO THE STATE COURT WHEN THE PRISONER REQUESTS LEAVE TO SUPPLEMENT COUNSEL'S BRIEF ON APPEAL AND THE STATE COURT SUMMARILY DENIES THE REQUEST TO FILE THE SECOND BRIEF THAT MAY OR MAY NOT HAVE INCLUDED THE CLAIM, AND WHEN THE PRO SE MOTION FOR NEW TRIAL RAISES A CLAIM DIFFERENT FROM THE CLAIM THE PRISONER RAISED IN HIS FEDERAL HABEAS CORPUS PROCEEDING.

II.

WHETHER A RIGHT TO CONFRONT WITNESSES AT A PRE-TRIAL DEPOSITION IS A RIGHT THAT IS FIRMLY DICTATED BY THIS COURT'S PAST PRECEDENT IN ORDER FOR A CLAIM BASED ON THAT RIGHT TO BE REVIEWED IN A FEDERAL HABEAS CORPUS PROCEEDING.

III.

WHETHER A FEDERAL HABEAS COURT SHOULD DETERMINE IF CONSTITUTIONAL ERROR HAD A SUBSTANTIAL AND INJURIOUS EFFECT UPON THE VERDICT, OR THAT THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT, WHEN THE STATE COURT DID NOT HAVE THE OPPORTUNITY TO CONDUCT A HARMLESS ERROR ANALYSIS.

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The August 28, 1997 panel opinion of the United States Court of Appeals granting the petition for writ of habeas corpus is reported at 124 F.3d 944 (8th Cir. 1997), and is included in the Appendix at A-1. The November 22, 1996 panel opinion of the United States Court of Appeals denying the petition for writ of habeas corpus is reported at 100 F.3d 1394 (8th Cir. 1996) and is included in the Appendix at A-33. The District Court's order denying the petition for writ of habeas corpus is not reported, but is included in the Appendix at A-57.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on August 28, 1997. The motion for rehearing or rehearing en banc was denied on October 7, 1997. Under Supreme Court Rule 13.1 the petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was charged by indictment with first degree murder. Section 565.020, RSMo. 1986. The evidence adduced at trial established that respondent and his victim, Henry Johnson, were inmates at the Missouri State Penitentiary. Petitioner and Johnson were cellmates until they were separated because of problems between the two. Shortly after 9:00 p.m. on August 7, 1985, Officer Thomas Steigerwald approached a group of six or seven inmates standing in a group on the upper lawn near the prison chapel when he observed an inmate clad in a gray sweatshirt strike Johnson in the upper chest. After a short pursuit Officer Steigerwald apprehended respondent. Johnson ultimately died of stab wounds to the heart. Respondent was found guilty of murder in the first degree and was sentenced to death.

Respondent's conviction and sentence were affirmed on direct appeal. ***See State v. Clemmons***, 756 S.W.2d 475 (Mo. banc 1988), ***cert. denied***, 490 U.S. 1113 (1989). Respondent then pursued a post-conviction relief motion in the Circuit Court under Missouri Supreme Court Rule 29.15. Upon denial of that motion, respondent appealed the Circuit Court's denial to the Missouri Supreme Court. Respondent requested permission to supplement the brief filed by post-conviction appellate counsel (A-105). The Missouri Supreme Court denied respondent's request (A-109). The Missouri Supreme Court affirmed the Circuit Court's denial of respondent's post-conviction relief motion. ***See Clemmons v. State***, 785 S.W.2d 524 (Mo. banc), ***cert. denied***, 498 U.S. 882 (1990).

On October 16, 1990, respondent filed a petition for writ of habeas corpus under 28 U.S.C. §2254 in the United States District Court for the Western District of Missouri.

An amended petition was subsequently filed. After responsive pleadings and a hearing in the District Court, respondent's petition was denied (A-57).

The United States Court of Appeal for the Eighth Circuit affirmed the District Court's denial on November 22, 1996 (A-33). ***See Clemmons v. Delo***, 100 F.3d 1394 (8th Cir. 1996). After granting respondent's motion for rehearing, the panel reversed itself and the District Court's denial and granted the petition for writ of habeas corpus on August 28, 1997 (A-1). ***See Clemmons v. Delo***, 124 F.3d 944 (8th Cir. 1997). The Court of Appeals concluded that a list of 130 issues attached to a pro se procedural motion fairly presented each of those 130 issues. It also concluded that respondent's rights under the Confrontation Clause were violated when a pre-trial deposition was admitted into evidence without objection at trial where respondent, through counsel, declined to attend the deposition. The Court also concluded that the state did not show this error was harmless beyond a reasonable doubt. Petitioner's motion for rehearing or rehearing en banc was denied on October 7, 1997 (A-104).

REASONS FOR GRANTING THE WRIT

I.

A PRISONERS REQUEST FOR LEAVE TO FILE A SUPPLEMENT COUNSEL'S BRIEF ON APPEAL DOES NOT "FAIRLY PRESENT" CLAIMS WHEN THE STATE COURT SUMMARILY DENIES THE MOTION REQUESTING TO FILE A PRO SE BRIEF NO MATTER IF THE MOTION MAY OR MAY NOT HAVE INCLUDED THE CLAIMS THE PRISONER WANTED TO RAISE IN THE PRO SE BRIEF, NOR IS A CLAIM "FAIRLY PRESENTED" WHEN A PRO SE MOTION FOR NEW TRIAL RAISES A CLAIM DIFFERENT FROM THE CLAIM THE PRISONER RAISED IN HIS FEDERAL HABEAS CORPUS PROCEEDING.

Facile attempts by the lower federal courts to destroy the delicate relationship between state and federal review this Court has nurtured over the past twenty years are matters of importance that warrant a writ of certiorari in that the decision of the Court of Appeals threatens the state courts' ability to decide when a pleading submitted in the state court is properly before the court.

Before the District Court respondent presented a discovery claim based on the State's alleged failure to disclose a memorandum containing a report of an eyewitness who did not see respondent's involvement in the crime. ***Brady v. Maryland***, 373 U.S. 83 (1963). The District Court found a procedural bar to review this claim due to respondent's failure to brief the issue during his state collateral review appeal (A-74-78). The Court of Appeals, however, found in the opinion after rehearing that no bar existed since the claim was one of 130 claims "fairly presented" to the Missouri Supreme Court in a list of issues

attached by respondent to a pro se motion to file a pro se supplemental brief, a motion that was summarily denied by the Missouri Supreme Court.

Attaching lists of issues to a procedural motion should not be deemed to constitute fair presentation of substantive issues to an appellate court. The novel rule adopted by the Court of Appeals will create havoc with the delicate relationship built by this Court between state and federal judiciaries.

This case presents a significant question because it allows this Court to decide when a claim is fairly presented to a state court allowing review of the claim in a federal habeas corpus proceeding under 28 U.S.C. §2254. ***See Picard v. Connor***, 404 U.S. 270 (1971). In ***Duggar v. Adams***, 489 U.S. 401 (1989), this Court stated that "the few cases that respondent and the dissent cite as ignoring procedural defaults do not convince us that Florida Supreme Court fails to apply its procedural rule regularly and consistently". ***Id.*** 410 n. 6. Here, the Court of Appeals relied on only one opinion cited by the respondent in which the Missouri Supreme Court allowed the filing of a pro se brief in support of its holding that the Missouri Supreme Court's denial of respondent's ***motion*** to file a pro se supplemental brief did not act as an independent and adequate state bar. Moreover, the Court of Appeals applied a "unique circumstance" and close enough exception in this case for finding that there was no procedural default. The Court of Appeals reliance on a single Missouri Supreme Court case to find that there was no independent and adequate state bar, and a unique circumstance or close enough exception to the procedural default doctrine, threatens Missouri's procedural requirements for raising claims in state court. Therefore, the grant of certiorari is warranted.

In *Sawyer v. Whitley*, 505 U.S. 333 (1992), this Court held that if a petitioner fails to "follow applicable state procedural rules in raising his claims", he is procedurally barred from raising them in a federal habeas corpus proceeding. *Id.* at 338. The Court of Appeals determined that respondent's *Brady* and Confrontation Clause claim were fairly presented to the Missouri state courts when respondent requested permission to supplement post-conviction counsel's brief (A-10; A-26-27). The Court of Appeals stated that "perhaps [due to the] unique circumstance of this case" we think the *Brady* claim was fairly presented (A-9).[1] The Court of Appeals also determined that respondent's Confrontation Clause claim was fairly presented in his pro se motion for new trial which alleged that the submission of Officer Stiegerwald's deposition at trial was both "unconstitutional and unnecessary in that the witness was not *legally unavailable*", because the claims were close enough (A-25)(emphasis added).

In *Wilwording v. Swenson*, 404 U.S. 249 (1971), this Court held that the exhaustion requirement is met once a federal claim has been fairly presented to the state courts. *Id.* at 250. However, this Court has noted that it is simply not enough to have proceeded through the state courts to say a

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[1] The Court of Appeals also determined that the claim was fairly presented because respondent requested post-conviction appellate counsel to present the additional claims but counsel declined to do so. The Court of Appeals stated that because the client "is and always remains the master of his cause", respondent should not be held responsible for the procedural default (A-9). Of course, this holding that respondent does not bear the burden of post-conviction appellate counsel's actions is contrary to *Coleman v. Thompson*, 501 U.S. 722, 754 (1991) and *Jones v. Barnes*, 463 U.S. 745 (1983).

claim was fairly presented. ***Picard v. Connor***, 404 U.S. at 275-76. In order for a claim to have been fairly presented, the prisoner must present the substantially equivalent claim raised during his state court proceedings in his federal habeas corpus petition. ***Id.*** at 278. While this Court has yet to hold, it would only appear logical that in order for a claim to have been fairly presented to the state court it must comport with the state courts requirement for presenting such a claim. In other words, it is insufficient for a prisoner to invent unavailable motion just to say that the claim was fairly presented to the state court.

In the present case, respondent's counsel filed a brief in the post-conviction appeal on or about December 8, 1989. Shortly thereafter, respondent filed a pro se motion to file a pro se supplemental brief. Respondent alleged in the motion that there were 130 issues respondent wanted to present in his pro se supplemental brief. The Missouri Supreme Court denied the motion to file a pro se supplemental brief on January 23, 1990. No pro se supplemental brief was filed, only the one drafted by counsel. It seems extremely odd that the Court of Appeals found that there was sufficient briefing of the issues when there was no pro se supplemental brief filed.

As in ***Wilwording***, the Court of Appeals found that respondent's claim was fairly presented to the Missouri state courts without citing a single instance in which a request for leave to supplement a brief was granted. ***Id.*** 404 U.S. at 250. Rather, the Court of Appeals relied on one case cited by the respondent in which a pro se brief was filed. Reliance on the acceptance of a pro se brief instead of a request to supplement a brief was unexplained. Nor was it enough for the Court of Appeals to find that respondent's motion to supplement the brief had attached exhibits and documents

listing his ***Brady*** claim.[2]

Giving a state court the opportunity to review a claim is significantly different then properly raising a claim in state court. In order for a claim to be properly raised it must be presented to the state court in accordance with state procedural rules. Likewise, silence on the part of the state rules about particular methods for presenting a claim does not mean that the presentation of the claim was proper. For instance, a prisoner cannot raise a claim of ineffective assistance of counsel in a motion pursuant to a nonexistent rule and then assert that the claim was properly raised to the state court because nothing prohibited the filing of the motion despite the fact that the state rules do not have a rule allowing for such motion. This is in essence what the Court of Appeals found. The Court of Appeals found that because the rules were silent as to the filing of a supplemental brief, the request to file a supplemental brief properly placed the 130 issues before the Missouri Supreme Court.

While the Missouri Supreme Court summarily denied respondent's request to file a supplemental brief, the ruling cannot be deemed to have reviewed the merits of the issues respondent's request wanted to present in a supplemental brief despite the fact that the request attached exhibits. ***See Ylst v. Nunnmaker***, 501 U.S. 797 (1991). The summary denial of respondent's request to supplement post-conviction appellate counsel's brief was proper given that the request

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[2] In fact, the Court of Appeals held that the exhibits and documents were "presumably" in the record before the Missouri Supreme Court (A-9). The Court of Appeals use of the word "presumably" is interesting since the record before the Court of Appeals included only the motion to file a pro se supplemental brief, and not the list of 130 claims to be included.

simply alleged that 130 additional claims should have been raised by his post-conviction appellate counsel. Whether respondent attached exhibits to his request does not change the outcome of the issue, that being whether the claim was fairly presented when he filed a request to supplement the brief.

It appears that the Court of Appeals placed great emphasis on the fact that respondent's request to supplement the brief attached exhibits. Under the Court of Appeals rule, the Missouri Supreme Court should have addressed respondent's ***Brady*** claim, Confrontation Clause claim, and the 128 other claims alluded to in respondent's request to file a supplemental brief. While this Court found in ***Smith v. Digmon***, 434 U.S. 332 (1978), that claims were fairly presented when they were "squarely raised" in the prisoner's brief, it did so only after noting that the State vigorously opposed the claims in their brief. ***Id.*** at 333. In the present case the State never had the opportunity to oppose the claims in the motion because they were never raised in a brief to the Missouri Supreme Court. Therefore, it cannot be said that the claims were fairly presented.[3] Unless the state court actually rules on the claims, ***see Castille v. Peoples***, 489 U.S. 346, 351 (1989), or ignores claims that were raised "as of right", ***Smith v. Digmon***, ***supra***, it cannot be said that the claim has been fairly presented. The Missouri Supreme Court did not actually rule on respondent's claims alluded to in his request to supplement the brief, nor did they ignore claims that were raised as a matter of right. Respondent had no "right" to file a second brief after counsel had already filed one. Thus, the claims were not properly before the state

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[3] Of course, the issues would be fairly presented if (1) the Missouri Supreme Court had granted respondent's motion, and (2) respondent had submitted a pro se supplemental brief that complied with Missouri Supreme Court Rule 84.04.

courts.

The Court of Appeals also erred in finding that the Confrontation Clause claim was fairly presented in the state courts when respondent alleged in his pro se motion for new trial that Officer Stigerwalds' deposition should not have been read during his trial because he was not legally unavailable. Respondent's ground for relief during his federal habeas corpus proceedings alleged that the Confrontation Clause was violated when respondent was not present at the pre-trial deposition. Whether the Confrontation Clause requires respondent to be present at a pre-trial deposition is significantly different than a claim that the deposition was improperly admitted at trial because there was no showing that the person deposed was legally unavailable. The factual and legal theories differ; thus, respondent did not fairly present the Confrontation Clause claim. ***Picard v. Conner***, ***supra***. Because respondent did not present his claim that the Confrontation Clause was violated when he was not present at the pre-trial deposition to the Missouri courts, this claim was not fairly presented to the Missouri state courts to allow review in his federal habeas corpus proceeding. It is not enough that respondent's pro se motion for new trial and federal habeas corpus proceeding cited the Confrontation Clause.

Since neither the ***Brady*** claim, nor the Confrontation Clause claim, was properly submitted to the Missouri courts, the Court of Appeals erred in granting review on these issues.

II.

THE RIGHT TO CONFRONT WITNESSES AT A PRE-TRIAL DEPOSITION IS NOT A RIGHT THAT IS FIRMLY DICTATED BY THIS COURT'S PAST PRECEDENT IN ORDER FOR A CLAIM BASED ON THAT RIGHT TO BE REVIEWED IN A FEDERAL HABEAS CORPUS PROCEEDING.

The Court of Appeals' decision assumes the existence of a Constitutional right to attend a pre-trial deposition that may not be waived by counsel's decision not to procure respondent's attendance at the deposition or by counsel's decision not to object to the deposition's admission into evidence at trial. The mere statement of the Court of Appeals' rule manifests its novelty. This rule should not have been developed or applied retroactively in a habeas corpus proceeding. ***Teague v. Lane***, 489 U.S. 288 (1989). This action by the Court of Appeals creates a significant question for this Court's review. Additionally, the ease by which the Court of Appeals circumvented the ***Teague*** doctrine warrants the Court's use of supervisory authority to review the decision of the Court below.

This case presents to the Court an opportunity to discuss whether past precedent dictates that a defendant has a right to be present at a ***pre-trial*** deposition and whether such presence can be waived by counsel, or whether the Court of Appeals' decision that respondent's right to confront witnesses extends to a ***pre-trial*** deposition was erroneous under ***Teague v. Lane***, ***supra***. ***See Penry v. Lynaugh***, 492 U.S. 302, 312-14 (1989)(holding that ***Teague*** applies in capital cases).

"[H]abeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those

rules would be applied retroactively to *all* defendants on collateral review" ***Teague***, 489 U.S. at 316. This means that "unless reasonable jurists hearing petitioner's claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor, [the courts] are barred from doing so now". ***Graham v. Collins***, 506 U.S. 461, 467 (1993), quoting ***Saffle v. Parks***, 494 U.S. 484, 488 (1990). ***Teague*** is a threshold issue. ***Caspari v. Bohlen***, 510 U.S. 383, 389 (1994).[4]

The Court of Appeals held that far from being a new rule, respondent's claim that his right to confront witnesses was violated by his absence from a pre-trial deposition "presents a paradigmatic" violation of the Confrontation Clause (A-27). Rather than citing cases in which this Court has dictated or even suggested there was a right to confront witnesses at a pre-trial deposition, the Court of Appeals chose to analyze respondent's right to be present with general language of this Court discussing the Confrontation Clause (A-28-30).

Not one single decision cited by the Court of Appeals stands for the proposition that a defendant has a right to be present and confront witnesses at a pre-trial deposition. Not one single decision mandates the grant of relief when the

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[4] ***Teague*** requires a three step inquiry. ***See O'Dell v. Netherland***, 117 S.Ct. 1969, 1973 (1997). The first step is to determine when the conviction became final. The second step is to determine whether a state court considering the claim when the conviction became final would have felt compelled by existing Supreme Court precedent to conclude the constitution required ruling in the habeas applicant's favor. The third step is to determine whether a new rule nonetheless falls within one of the two narrow exceptions to the ***Teague*** doctrine.

petitioner, acting through counsel, does not object to the deposition's admission into evidence at trial. The Court of Appeals improperly "stretched" this Court's general language about the Confrontation Clause to explain a grant of habeas relief. ***See Caspari v. Bohlen***, 510 U.S. at 396. This stretch warrants the grant of certiorari supervise and to correct the Court of Appeals' error in extending the Confrontation Clause to pre-trial proceedings.

The Court of Appeals held that respondent's right to confront witnesses at a pre-trial deposition "is not a violation about which reasonable jurists may disagree" (A-29). Yet the Court of Appeals failed to cite one single case in which ***any*** jurist found that the Confrontation Clause was violated by a defendant's absence from a pre-trial deposition. This Court has never held that the use of a deposition is prohibited during a trial. Rather, this Court has held that the use of an out-of-court statement of an unavailable witness ***does not*** violate the Confrontation Clause. ***Ohio v. Roberts***, 448 U.S. 56, 64-66 (1980). In fact, this Court stated in ***Maryland v. Craig***, 497 U.S. 836 (1990), that past precedent merely establishes a "preference" for face-to-face confrontation. ***Id.*** at 849. The use of out-of-court statements is permitted if the reliability of the testimony is assured. ***Id.*** at 850.

As just indicated, the Confrontation Clause is not violated when an out-of-court statement is reliable. The Court of Appeals held that there was no plausible argument that Captain Gross's out-of-court statement was inherently reliable or that cross-examination before the trier of fact in front of respondent and the jury would have been of only marginal value (A-29). However, the District Court noted that such a position is "surely unknowable" (A-67). The problem with these holdings is that they miss the mark on the reliability issue. The question is whether the out-of-court statements could have been sufficiently challenged to tests its

reliability. ***Ohio v. Roberts***, 448 U.S. at 70-72. Here, respondent's trial counsel not only attended Captain Gross's deposition, he actively engaged in the cross-examination of Captain Gross. Counsel did not object to the admission of the deposition. The ability to challenge Captain Gross's out-of-court statements was sufficient enough to give the statements the reliability indicated by this Court. Simply saying that out-of-court statements are unreliable because defendant was not present would be inconsistent with this Court's holding to the contrary and never allow any out-of court statements to be admitted unless the defendant was present no matter how reliable the statements may have been.

The Court of Appeals appears to ignore the fact that this Court has never ***dictated*** a defendants presence at a pre-trial deposition in arriving at their conclusion. Because the Court of Appeals fails to rely on past precedent of this Court to arrive at its ruling, certiorari should be granted to review this claim.

III.

A FEDERAL HABEAS COURT SHOULD DETERMINE IF CONSTITUTIONAL ERROR HAD A SUBSTANTIAL AND INJURIOUS EFFECT UPON THE VERDICT, RATHER THAN WHETHER THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT, WHEN THE STATE COURT DID NOT HAVE THE OPPORTUNITY TO CONDUCT HARMLESS ERROR ANALYSIS BECAUSE THE CLAIM WAS NEVER RAISED IN STATE COURT.

This question allows the Court to resolve a conflict in the Circuits on what standard of review should be applied for harmless error when the state court did not have the opportunity to conduct a harmless error review because the prisoner did not raise the claim in state court. This conflict is one that some lower courts have noted, and indeed, some have deferred ruling on harmless error due to the conflict. This conflict is ripe for resolution.

After determining that respondent's Sixth Amendment rights under the Confrontation Clause were violated, the Court of Appeals did not conduct an analysis to determine if respondent showed that the error had a substantive and injurious effect or influence in determining the jury's verdict pursuant to ***Brecht v. Abrahamson***, 507 U.S. 619, 637 (1993). Instead, the Court of Appeals applied the harmless beyond a reasonable doubt standard under ***Chapman v. California***, 386 U.S. 18 (1967) (A-31). The ***Chapman*** standard was applied by this Court in reviewing direct appeals for Constitutional errors. This case gives the Court an opportunity to correct the Court of Appeals on this significant issue and to correct the Court of Appeals' decision in this case which threatens the decisions of state courts by rewarding prisoners who fail to raise claims in their direct

appeal.

In ***Orndorff v. Lockhart,*** 998 F.2d 1426 (8th Cir. 1993), the Court of Appeals wrote that it would not follow ***Brecht*** where the state appellate courts did not have the opportunity to address the harmlessness of the error.

> In the case before us however, the state courts did not have the opportunity to review the error at all, and the federal habeas court was the first court to review the Constitutional error under the ***Chapman*** harmless error standard. As a result, we find that [the] rule announced in ***Brecht*** does not apply and that the ***Chapman*** harmless error standard is the appropriate test in this case.

Orndorff v. Lockhart, 998 F.2d at 1430. The Eighth Circuit's position does not recognize this court's rationale in ***Brecht*** that held "[t]he ***Kotteakos*** harmless-error standard is better tailored to the nature and purpose of collateral review." ***Brecht,*** 507 U.S. at 623. In ***Brecht,*** this Court adopted the ***Kotteakos*** prejudice standard for habeas review due to the high societal cost of the review. ***Brecht v. Abrahamson,*** 507 U.S. at 637, quoting ***Kotteakos v. United States,*** 328 U.S. 750, 776 (1946).

The United States Court of Appeals for the Fourth Circuit, sitting en banc, followed ***Brecht*** and rejected the ***Orndorff*** position in ***Sherman v. Smith,*** 89 F.3d 1134 (4th Cir. 1996) (en banc). The Fourth Circuit joined the Seventh, Tenth and Eleventh Circuit in rejecting the Eighth Circuit's failure to follow ***Brecht. See Castro v. Oklahoma,*** 71 F.3d 1502, 1516 n.14 (10th Cir. 1995); ***Tyson v. Trigg,*** 50 F.3d 436, 446-47 (7th Cir. 1995), ***cert. denied,*** 116 S.Ct. 697 (1996); ***Horsley v. State of Alabama,*** 45 F.3d 1486, 1492 n.

11 (11th Cir.), ***cert. denied***, 116 S.Ct. 410 (1995). The Second and Ninth Circuits have left this issue for decisions at a later date. ***Hanna v. Riveland***, 87 F.3d 1034, 1038 n. 2 (9th Cir. 1996); ***Lyons v. Johnson***, 99 F.3d 499, 503 (2nd Cir. 1996). This Court's decision in ***O'Neal v. McAninch***, 513 U.S. 432 (1995) and ***California v. Roy***, 117 S.Ct. 337 (1996) do not resolve the split between the Circuits since it appears that the state courts conducted harmless error analysis in both these cases.

The present case is an excellent vehicle by which to resolve the conflict. The evidence of respondent's guilt is strong. Respondent does not show how his attendance at Gross's deposition would have helped respondent's case. Nor does respondent show that Gross's live testimony before the jury would have been different. Thus, respondent cannot fulfill his burden under ***Brecht***.

Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to resolve the split among the Circuits regarding whether ***Chapman*** or ***Brecht*** applies in federal habeas corpus review when the state court did not have an opportunity to conduct harmless error review.

CONCLUSION

Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and reverse the judgment of that court.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. 97-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

vs.

ERIC CLEMMONS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX

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INDEX OF PETITIONER'S APPENDIX

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2. Opinion of the United States Court of Appeals for the Eighth Circuit, filed November 22, 1996, in ***Eric Clemmons v. Paul Delo***, No. 96-1086, affirming the District Court's denial of the petition for writ of habeas corpus. . . . A-33

3. Order of the United States District Court for the Western District of Missouri, filed July 7, 1995, in ***Eric Clemmons v. Paul Delo***, No. 90-0943-CV-W-6, denying the petition for writ of habeas corpus. A-57

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1086WM

Eric Clemmons,	*	
	*	
Appellant,	*	
	*	On Appeal from the United
	*	States District Court
v.	*	for the Western District
	*	of Missouri
Paul Delo,	*	
	*	
Appellee.	*	

Submitted: July 21, 1997

Filed: August 28, 1997

Before RICHARD, S. ARNOLD, Chief Judge, FLOYD R. GIBSON, Circuit Judge,

and KORNMANN,* District Judge.

---

* The Hon. Charles B. Kornmann, United States District Judge for the District of South Dakota, sitting by designation.

RICHARD S. ARNOLD, Chief Judge.

In 1987, Eric Clemmons was convicted and sentenced to death for the murder of a fellow inmate at the Missouri State Penitentiary. Exculpatory evidence was apparently withheld from Clemmons by the State prior to his trial. In addition, evidence that was important to the State's case came in by deposition, raising serious issues under the Confrontation Clause. After exhausting his state remedies, Clemmons filed this petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri. While the District Court, agreed that the above two claims probably warranted reversal of Clemmons's conviction, it found that they were procedurally barred and therefore denied Clemmons's petition. This appeal followed, and we affirmed. 100 F.3d 1394 (8th Cir. 1996). Clemmons then filed a petition for rehearing by the panel. We granted the petition,[1] thus vacating the

[1] Two principal concerns led us to take the unusual step of granting rehearing by the panel. First, the petition for rehearing pointed out that, contrary to our earlier view, see 100 F.3d at 1403, petitioner had in fact presented evidence crucial to his Confrontation Clause claim to the state post-conviction court. See infra at 19. Second, we had no properly understood Missouri evidence law, a mistake that caused our analysis of the prejudice cause by the Brady violation to be flawed. Compare 100 F.3d at 1397-98, with infra at 9-10.

initial panel opinion and judgment, and now reverse the judgment of the District Court.

I.

The District Court and the Missouri Supreme Court have rendered careful and detailed opinions reciting the facts in this case. Clemmons v. Delo, No. 90-0943-CV-W-6 (W.D.Mo., July 7, 1995) (Memorandum and Order); State v. Clemmons, 753 S.W.2d 901 (Mo.) (en banc), cert. denied, 488 U.S. 948 (1988). We will summarize them here only to the extent necessary for our review. On August 7, 1985, Clemmons was an inmate at the Missouri State Penitentiary. Shortly before 9:00 that evening, Corrections Officer Thomas Steigerwald, while walking towards a group of inmates standing near Housing Unit 3, observed one of the inmates grab another, strike him in the chest, and then hit him with a roundhouse punch in the side. Henry Johnson, the inmate who had been struck, ran past Steigerwald to the entrance to the main corridor. As he did so, Steigerwald noticed blood on Johnson's shirt. It was then that Steigerwald realized that a stabbing had occurred.

Steigerwald called for backup on his radio and began to pursue the inmate whom he had seen striking Johnson. That inmate, who was wearing a gray sweatshirt, and another inmate, who was wearing a gray towel around his head, began to move towards the prison chapel. Eventually, these inmates separated, and Steigerwald decided to pursue the one in the gray sweatshirt. He testified that he saw the facts of both

inmates, as well as a knife in the hand of the inmate in the gray sweatshirt.

Steigerwald eventually caught up with the inmate in the sweatshirt, who was Clemmons. By that time the sweatshirt had been turned inside out so that it appeared to be white. There was human blood on the gray part of the sweatshirt, though it could not be typed. No knife was ever found.

The inmate in the gray towel was also caught. When his cell was searched, a hat and a school book belonging to Clemmons were found. The book was splattered with blood. The inmate had been seen entering the housing unit carrying the hat and the book shortly after the stabbing. The blood splatters on the hat were human blood of either type B or type AB. Johnson, the victim, had type B blood.

Johnson later died. An autopsy revealed that he had been stabbed three times. The fatal blow was to the left side of his chest and penetrated his heart. He also sustained a stab wound to his left side and another under his right arm. A scratch on his shoulder was also discovered, but it is uncertain whether the scratch was inflicted at the same time as the three stab wounds. Prior to the death, Johnson exclaimed, "they have stuck me in my heart."

Clemmons was charged with murdering Johnson. At this trial, there were pieces of particularly damaging evidence against him. The first was Steigerwald's testimony identifying him as the person who struck Johhnson and as having a knife. The second was

testimony from Captain A.M. Gross that Clemmons had stated in Gross's presence, "I guess they got me." Clemmons's defense was that another inmate, Fred Bagby, had killed Johnson, and several inmates testified more or less to that effect. According to Clemmons, what Steigerwald saw was Johnson running into Clemmons after Bagby had already stabbed Johnson. Bagby had died by the time of trial, and the State argued that the testimony of Clemmons's witnesses should be discounted because it was easy for them to try to help Clemmons by blaming someone (Bagby) who could not defend himself.

Clemmons was found guilty. In the penalty phase, several aggravating circumstances were alleged. Most notably, Clemmons was a prisoner under sentence of life imprisonment without possibility of parole for 50 years for another murder when Johnson was killed. The jury sentenced Clemmons to death.

II.

Clemmons alleges that exculpatory evidence was withheld from him prior to his trial in violation of Brady v. Maryland, 373 U.S. 83 (1963). Following Clemmons's direct appeal, he discovered an important piece of evidence. On the very day that Johnson was killed, a Department of Corrections inter-office communication was written by Captain A. M. Gross, the same Captain Gross who testified against Clemmons, stating that another inmate had accused Fred Bagby of killing Johnson. The inter-office communication read as follows:

> On the above date at approximately 9:30 p.m. I was searching the upper yard for evidence in the stabbing that had taken place about 8:55 P.M. on inmate Johnson, Henry . . . when I met and interviewed inmate Clark, Dwight . . . . Clark said that he had witnessed the assault on Johnson, and that he had seen two (2) men stabbing Johnson. He described both assailants as being black, and he thought one was inmate Fred Bagby but only knew the second inmate by sight. When questioned in detail Clark did not make sense and further investigation reflects that Clark's statement is untrue.

This evidence was not provided to Clemmons's attorney, despite a discovery request for "[a]ny material or information . . . which tends to negate the guilt of the defendant."[2]

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[2] The State contends that the memorandum was in Johnson's inmate file, which was reviewed by trial counsel for Clemmons. We agree with the District Court that "[t[here is little need to resolve the [issue]." Memorandum and Order 13. "[I]f the memorandum was in the victim's file, but was not examined or was discounted by [trial counsel]," ibid., a claim of ineffective assistance of counsel would arise that would be just as strong or weak, as the case may be, as the Brady claim Clemmons now presses.

Clemmons raised the failure to disclose this memo in his initial postconviction motion under Rule 29.12 of the Missouri Rules of Criminal Procedure. The memo itself was introduced in evidence at the 29.15 hearing without objection from the State. Clemmons did not, however, call Clark as a witness, even though he had subpoenaed Clark, and Clark was available to testify. In fact, Clemmons himself specifically chose not to call Clark as a witness.

The 29.15 court denied Clemmons's motion, but did not discuss the Brady issue. Clemmons then appealed to the Missouri Supreme Court. See Clemmons v. State, 785 S.W.2d 524 (Mo.) (en banc) (affirming denial of postconviction relief), cert. denied, 498 U.S. 882 (1990). There, however, his lawyer, contrary to repeated instructions from Clemmons, failed to raise the issue of the undisclosed evidence. Clemmons, in an effort to save the issue, attempted to file a pro se supplemental brief with the Missouri Supreme Court, but his motion or leave to file the brief was denied.

Clemmons once again raised the Brady issue in his petition for a writ of habeas corpus before the District Court. That Court held that the claim was procedurally barred.

A.

Clemmons's initial difficulty stems from the fact that the Brady issue was not raised in the appeal from the denial of postconviction relief. Omission of this issue was a serious mistake by Clemmons's appointed counsel, perhaps the sort of mistake that, if committed at

trial or on direct appeal, would amount to ineffective assistance in violation of the Sixth and Fourteenth Amendments, but error of this kind on the part of postconviction counsel cannot be "cause" to excuse a procedural default. See Coleman v. Thompson, 501 U.S. 722, 753 (1991); Nolan v. Armontrout, 973 F.2d 615 (8th Cir. 1992).

What we have here, however, goes beyond a mere omission on the part of counsel. After counsel had been appointed to represent Clemmons on his 29.15 appeal (counsel different from the lawyer who had represented him in the postconviction trial court) Clemmons wrote the new lawyer to request that he be kept informed. He specifically stated that he wanted all of his issues preserved. Appointed counsel, however, filed a brief in the 29.15 appeal without giving Clemmons an opportunity to review it and without including in the brief all of the issues previously raised in the trial court. Petitioner then wrote counsel and instructed him to file a supplemental brief raising the additional issues. Clemmons specifically drew the attention of counsel to the danger that issues not raised would later be held not to have been properly presented. "I want you to lay the ground work so if the Missouri Supreme Court refuse [sic] to hear [the unbriefed issues] the record will clearly show we tried to present them." Letter of December 26, 1989, App. 270. Counsel refused, stating that he had "made every argument on your behalf that I felt could be supported by law and evidence." Letter of December 29, 1989, App. 271.

Clemmons then made a motion in the Missouri Supreme Court for leave to file a supplemental brief pro

se. This motion recites that appointed counsel had filed a brief raising only six points that Clemmons had requested in writing that every other ground preserved by the record also be raised, and that counsel had refused this request. The motion further states that no fewer than 130 additional points should have been raised. It asks the court to accept a number of documents "as a supplemental brief in this cause," including the original and first amended 29.15 motions, both of which documents, presumably, were in the record before the Missouri Supreme Court. The Court denied the pro se motion without comment. The documents referred to in the motion included the Brady issue now under discussion.

As noted above, we agree with the State that mistakes made by counsel in postconviction proceedings to not constitute "cause" for habeas purposes. The initial question, though, is not whether there was cause to excuse a procedural default, but whether there was a default in the first place. In other words, did Clemmons fairly present his Brady claim in the state courts? In the perhaps unique circumstances of this case, we think the answer is yes.

It is perfectly true that counsel does not have to present every issue appearing in the record. In fact, it could be bad lawyering to do so, especially when there are so many potential issues. As counsel remarked in his letter to Clemmons, "[y]ou can't expect every single allegation to hold up in court, and it's not the number of allegations that matters anyway. One good issue is better than a thousand others." App. 271. The client, however, is and always remains the master of his cause. Here,

Clemmons did the only thing he could do: he tried to bring the issue to the attention of the Missouri Supreme Court himself. We do not criticize that Court for refusing leave to file the supplemental brief. Such matters are within the Court's discretion.[3] Our own practice is usually to refuse leave to file supplemental briefs in cases in which counsel has appeared. The fact remains that Clemmons called the attention of the Missouri Supreme Court to his Brady claim, among many others. We do not know what else he could have done, as a practical matter, to present the claim to that Court for decision on the merits.[4] We therefore hold that

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[3] No rule of or reported Missouri case of which we are aware specifies the circumstances under this Missouri appellate courts allow pro se briefs. A state procedural rule must be regularly adhered to if it is to be an adequate state ground supporting a procedural bar. E.g., James v. Kentucky, 466 U.S. 341, 348-51 (1984). Sometimes Missouri courts allow pro se briefs, and sometimes they do not. That is their prerogative. But in the absence of regularly applied criteria, the decision not to allow such a brief cannot be said to rest on a regularly applied rule of state procedural law.

[4] At the evidentiary hearing on this habeas petition, the District Court suggested that Clemmons could have fired his lawyer and then filed his pro se brief. No doubt a client can always discharge his lawyer, but the suggestion does not seem practical in the present circumstances. When Clemmons learned, after the fact, that his lawyer had violated his instructions by filing a brief omitting issues the client wanted raised, oral

the claim was fairly presented, and that the merits are now open for decision on federal habeas corpus.

B.

Whether framed as an ineffective assistance of counsel claim or as a Brady claim, Clemmons's claim indeniably states a constitutional violation. The next question, which we now address, is what facts we may properly consider to determine whether there is a reasonable probability that the outcome of the trial would have been different if the Gross memorandum had been produced prior to trial. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.' United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.) (adopted by the Court in Kyles v. Whitley, 514 U.S. 419, 434 (1995)). Clemmons does not have to show that he would more likely than not have been acquitted if the withheld evidence had been before the jury. "[A] showing of materiality does not require demonstration by a

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argument was only about a month away. Clemmons could have asked for appointment of new counsel to make the argument and file a supplemental brief, but he had no way of knowing whether such a motion would be granted. (Nor do we.) If he thought about his alternative, he could reasonably have concluded that it would not be in his best interest to risk having no lawyer at all to argue his case. We do nor normally order the release of inmates from jail to argue their appeals pro se, and we assume the practice of the Supreme Court of Missouri is similar.

preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ." Kyles, 514 U.S. at 434. The question is whether the defendant, in the absence of the evidence in question, "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Ibid. Further, Clemmons does not have to show that "after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to conflict." Id. at 434-35.

As we say above, Clemmons introduced the Gross memorandum at the Rule 29.15 hearing, but did not call Clark as a witness. Clark did testify before the District Court, and the District Court was favorably impressed by his testimony. The Court stated that "Clark may have a rather quirky personality, but he does largely 'make sense.' His credibility was rather high . . . . He seems individualistic and candid, not subject to 'prison etiquette.'" Memorandum and Order 13. The District Court concluded that "[i]t is difficult to avoid the conclusion that Clark would have been petitioner's best possible witness, during the guilt phase of the trial." Id. at 13-14.

In attempting to determine whether the withholding of Clark's testimony undermines our confidence in the outcome of the trial, we may at least assume that Clark would have testified at trial and that he would have said what was in the Gross memorandum. "Statements of uncalled witnesses are normally admissible at a Rule 29.15 hearing to demonstrate what the witness would have said if called at the original

trial." State v. Debler, 856 S.W.2d 641, 653 (Mo. 1993) (en banc).

The State argues that Bolder v. Armontrout, 921 F.2d 1359, 1363 (8th Cir. 1990), cert. denied, 502 U.S. 850 (1991), stands for the proposition that "the failure to present a witness during post-conviction evidentiary hearing constitutes a procedural default," see Appellee's Supp. Br. 23, but this excerpt is misleading. In Bolder, petitioner argued in his state postconviction proceeding that his trial counsel was ineffective for failing "to interview or call character witnesses and inmate witnesses" for use as mitigation evidence in petitioner's capital sentencing proceeding. 921 F.2d at 2362. This Court held that this claim was procedurally barred, not because of his failure actually to call the mitigation witnesses at his 27.26 proceeding, but because petitioner completely "failed to allege what mitigating evidence would have been discovered had [his lawyer] at trial conducted a reasonable investigation into his background." Id. at 1363 n. 6. The problem was not just that Bolder had failed to call the witnesses; he also neglected to allege what they would have said and thus failed to provide the 29.15 court with the particulars of his ineffective assistance of counsel claim. In contrast, Clemmons introduced Clark's statement, which, as we have already said, is admissible in 29.15 proceedings to show what Clark's testimony would have been at trial. Missouri law did not obligate Clemmons to do any more than he did to provide the 29.15 court with the factual basis of his claim. Clemmons was, therefore, not barred from presenting the substance of Clark's testimony to the District Court.

We have read the entire transcript of the guilt phase of the trial as it actually occurred in 1987. What would the evidence have looked like if the defense had been given and had used the Gross memorandum, and Clark had testified at trial as to the contents of the memorandum? First, a live witness would have testified that Fred Bagby and another inmate (who it is clear was not Clemmons) had stabbed Henry Johnson. Three other witnesses testified to the same effect at trial, but the prosecution was able to impeach their claims by pointing out that Bagby was "conveniently dead" at the time that they accused him of the murder. Bagby was alive at the time that Clark accused him of Johnson's murder. Indeed, Clark identified Bagby as the murderer less than one hour after the killing.

It is true that there were other problems with the testimony of the three witnesses who also accused Bagby of the murder. On direct examination, Justice Mays testified unequivocally that the victim, Johnson, hit Bagby in the face, and that Bagby then pulled a knife and stabbed Johnson three times. Johnson then ran and bumped into Clemmons, the defendant. On cross-examination, however, Mays's testimony was severely undermined. When he realized that he had placed the location of the alleged collision between Johnson and Clemmons at a place nowhere near the trail of blood found on the ground, he changed his testimony about the location. This change was highlighted during the State's closing argument to the jury.

Seymour Abdullah also identified Bagby as the perpetrator, and it was during cross-examination of this witness that the State referred to Bagby as "conveniently

dead." Tr. 448. According to Abdullah's version of the facts, however, it was Bagby, not Johnson, who had a collision with Clemmons, and Abdullah admitted that he saw no blood at the location of this collision. (The importance of the collision, according to the theory of the defense, is that it provides an explanation for the blood on Clemmons's sweatshirt.)

The final witness was Keith Brown, the inmate who, according to Officer Steigerwald, ran away from the scene with Clemmons and ended up with Clemmons's hat and book in his cell. Brown testified that there was a scuffle, and that Johnson began running, with Bagby right behind chasing him. Brown was less certain about the collision. He thought that Johnson appeared to have bumped into Clemmons, or another inmate named Lewis, or someone else. He then left the scene but returned to pick up some papers of his own. It was then, he said, that he happened to see a hat and some papers lying on the ground, which he picked up and took to his cell. On Cross-examination, he gave confused and evasive answers about his activities in the vicinity of the chapel. His version of the facts did not appear to be consistent with the location of the chapel door.

In addition to pointing out these inconsistencies, however, the State also pointed out several times in the trial that Bagby was dead when Clemmons's witnesses accused
him of the crime. In his closing argument, counsel for the State again referred to the "conveniently deceased Mr. Bagby," Tr. 500, although he also added that both Mays and Abdullah appeared to be uncertain as to

whether Bagby or the victim collided with Clemmons. Towards the end of the argument, another reference was made to the fact that the defense witnesses were blaming a dead man for the crime. At the very least, Clark would have been a witness whose identification of Bagby as Johnson's killer clearly did not stem from the fact that Bagby was no longer around to defend himself.

The State's strongest argument is that Captain Steigerwald's extremely damaging eyewitness testimony would have been unchanged by Clark's testimony. Steigerwald's testimony was clear, consistent with the physical evidence about the location of blood, and unshaken on cross-examination. It was almost dark when the incident began, and Steigerwald was a considerable distance away, but he was within 10 or 12 feet of Clemmons (the inmate in the gray sweatshirt whom he had seen strike Johnson). There is absolutely no reason to suspect that Officer Steigerwald fabricated any part of his testimony, and no one suggests that he did so. Nonetheless, Steigerwald admitted it was possible that inmates had a better view of the incident than he did. Tr. 275. In addition, though he testified originally that he had seen a knife in Clemmons's hand, he later admitted that he had only seen a flash of metal sharpened to a point. Id. at 258-59, 263. He did not see a knife handle and did not see anything in Clemmons's hand at the time Clemmons was supposed to have been assaulting Johnson. Id. at 258-59, 275. When Steigerwald caught up with Clemmons, Clemmons had eye glasses in his hand. Id. at 261, 283. We also note that Clark's story that two men stabbed Johnson is more consistent with Johnson's dying declaration that "they

have stabbed me in my heart" than the State's version that Clemmons was the killer.

The other major witness for the State was Captain A.M. Gross, who testified about the admission Clemmons is supposed to have made the next morning. Clemmons denies making any such statement, but not much in the way of a concrete reason for disbelieving Captain Gross is suggested. Presumably the Clark memorandum would have been used by the defense during cross-examination of this witness, and then Gross would have had the opportunity to explain why Clark did not make sense. Clark would have testified in the defense's case, and the jury would then have had the opportunity to assess Clark's credibility against Captain Gross's deposition testimony.

There is no question that the State's case would have remained strong even with the new evidence, and that the jury could still have reasonably determined that Clemmons was guilty. Nonetheless, we think there is a reasonable probability that the verdict would have been different were it not for this unquestioned violation of Clemmons's constitutional rights. As we described above, the State made reference several times during the trial to the fact that Bagby was dead to detract from the credibility of three of Clemmons's witnesses who accused him of the crime. The State could not have used this argument to attack Clark's testimony, and the argument would have been less helpful in attacking the testimony of the other three witnesses. The existence of the memorandum thus eliminated one of the State's key arguments for disbelieving the story that Bagby killed Johnson. We cannot say with confidence that the jury

would have reached the same verdict when presented with an eyewitness who accused a different inmate of the crime within an hour of the murder, the very same inmate that three other witnesses had also accused of the crime.

To this point, we have not discussed the District Court's favorable assessment of Clark and his testimony. The Court's evaluation further dampens our confidence in the verdict. The District Court concluded that "absent procedural default or waiver by petitioner, the belated discovery of the memorandum would justify a new trial." Memorandum and Order 13. It concluded, however, that Clemmons's failure to call Clark at the 29.15 hearing barred the Court's consideration of Clark's testimony at the hearing and, in turn, the Clark memorandum. As we explain above, the District Court could at least have assumed that Clark would have testified at trial consistently with the contents of the memorandum which Clemmons presented to the 29.15 court. The only question is whether the District Court had the discretion to evaluate the witness's credibility in addition to the substance of his testimony, despite the fact that Clemmons did not call Clark at the 29.15 hearing. We conclude that the District Court had the discretion to hold a hearing to evaluate how much of a difference Clark's testimony would have made, though it was not required to do so.

In Townsend v. Sain, 372 U.S. 293 (1963), overruled in part, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), the Supreme Court listed six circumstances under which district courts are required to hold evidentiary hearings to develop the factual basis for a petitioner's

habeas claims. 372 U.S. at 313-18. Keeney eliminates the hearing requirement for the fifth circumstance, where the facts were not adequately developed in the state courts, except where petitioners show cause and prejudice for their failure to develop the factual predicate for their claim fully in the state courts. 504 U.S. at 11-12. There is no question that Clemmons cannot show cause and prejudice and thus was not entitled to an evidentiary hearing under the fifth circumstance of Keeney.

Keeney, however, addresses only the circumstances under which an evidentiary hearing is required. "But Townsend also made clear that a District Court retained the power to hold a hearing even though one was not required . . . .This aspect of Townsend remains the law. As Justice O'Connor observed in dissent, 'the district courts . . . still possess the discretion, which has not been removed by today's opinion [Keeney], to hold hearings even where they are not mandatory.'" Pagan v. Keane, 984 F.2d 61, 64 (2d Cir. 1993) (quoting Keeney, 504 U.S. at 23 (O'Connor, Jr., dissenting)) (second ellipsis in original); see also Jamison v. Lockhart, 975 F.2d 1377, 1381 (8th Cir. 1992); Wilkins v. Bowersox, 933 F.Supp. 1496, 1504 (W.D.Mo. 1996), appeal submitted, No. 96-2441 (8th Cir., Mar. 10, 1997).[5] Once Clemmons properly preserved Clark's

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[5] As we say above, this is not a case where the petitioner completely failed to present the factual basis for his claim to the District Court. See Bolder, supra. Unlike Bolder, Clemmons presented to the state court what was necessary under state law for the state court to

testimony for consideration by the District Court, the District Court had the discretion to evaluate it for itself. Therefore, the District Court erroneously determined that it lacked the discretion to consider what was revealed to it at Clemmons's evidentiary hearing. The District Court's conclusion that Clark would have been a credible witness provides further support for our resolution of this issue. For these reasons, we hold that Clemmons has a meritorious Brady claim.

III.

We now turn to Clemmons's Confrontation Clause claim. Captain Gross testified by deposition that Clemmons stated "I guess they got me" in Gross's presence shortly after Johnson's murder. Gross did not testify at trial, but his deposition was admitted into evidence with the consent of Clemmons's lawyer as a courtesy to Captain Gross, whose wife had passed away just prior to trial. Clemmons's lawyer was present at the deposition and cross-examined Gross, but Clemmons was not present because his lawyer had not informed him that the deposition was going to take place. Clemmons did not find out about the deposition until it was being introduced into evidence at his trial, and never consented to its admission. Clemmons contends on appeal that the admission of the deposition without his consent violated his right to confront the witnesses against him.

A.

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consider the substance of his claim.

As an initial matter, the State contends that Clemmons presented only an ineffective assistance of counsel claim to the District Court, and should not be allowed to raise a free-standing Confrontation Clause claim for the first time on appeal.

It may be true that Clemmons's initial habeas petition does not artfully raise a free-standing Confrontation Clause claim. The part of the petition addressing the Gross deposition reads "A. Mr. Clemmons was denied effective assistance of counsel during the pre-trial stage of his case because . . . " and continues:

> 3. Trial counsel agreed to the deposition of Captain Gross and did not object to presentation of Captain Gross' testimony at time of trial without informing Petitioner of his actions. Said actions by trial counsel waived Petitioner's right to confront the witnesses against him in accordance with the Sixth Amendment to the U.S. Constitution and deprived Petitioner of his right to meaningful cross examination of those witnesses against him . . . . Clearly, there was no reason to agree to a deposition of a prosecution witness because there was no basis for such testimony to be helpful to Petitioner.

Clemmons's First Amendment Petition for Writ of Habeas Corpus 3, 6-7. Yes, as the State recognizes, Clemmons raised a free-standing Confrontation Clause claim in a brief submitted after the District Court held an

evidentiary hearing and over one year before the District Court filed its opinion dismissing Clemmons's petition. See Petitioner's Post-Hearing Br. 10. The State then submitted a response to Clemmons's post-hearing brief which specifically addressed the merits of Clemmons's Confrontation Clause claim. The State's response did not object that Clemmons's Confrontation Clause claim had been improperly raised in the post-hearing brief because he had failed to raise this claim in his petition.[6]

We hold that Clemmons's free-standing Confrontation Clause claim was properly presented to the District Court.

B.

We now turn to the State's argument that the Confrontation Clause claim is procedurally barred. The State first argues that Clemmons's failure to raise a Confrontation Clause claim on the direct appeal from his conviction bars our consideration of this claim.

Clemmons asserts ineffective assistance of appellate counsel as cause for his failure to raise the

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[6] In addition, Clemmons's pro se habeas petitioner expressly incorporated pleadings from the 29.15 proceeding, including the 27.26 Addendum, which expressly asserts a free-standing Confrontation Clause claim.

Confrontation Clause claim on direct appeal.[7] In Missouri, claims of ineffective assistance of appellate counsel are properly raised in a motion to recall the mandate. Clemmons filed an initial motion to recall the mandate which asserted a generalized claim of ineffective assistance of appellate counsel but did not specify that the failure to raise the Confrontation Clause claim demonstrated ineffectiveness. We agree with the State that this motion was not specific enough to preserve Clemmons's claim of cause. Years later, while this habeas petition was pending before the District Court, Clemmons filed a second motion to recall the mandate which was denied without comment.

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[7] The State argues that Clemmons failed to argue ineffective assistance of appellate counsel to the District Court as cause for his failure to raise the confrontation Clause claim on direct appeal and, therefore, is barred from doing so in this Court. We do not agree with Clemmons's contention that his assertion of cause in his Motion to Amend and Alter Judgment was sufficient to present the claim to the District Court. See Bannister v. Armontrout, 4 F.3d 1434, 1440 (8th Cir. 1993), cert. denied, 513 U.S. 960 (1994). Still, so far as we can tell, the State did not clearly assert this procedural bar in any of the papers it submitted to the District Court. Clemmons, of course, would have no reason to assert cause for a procedural bar that the State failed clearly to assert.

Apparently, Missouri law permits successive motions to recall the mandate.[8] The State does not argue that there is regularly applied procedural rule in Missouri that prohibits the filing of successive motions to recall the mandate. Moreover, Clemmons points to two cases in his Supplemental Brief, at 35, in which a Missouri Court of Appeals considered successive motions to recall the mandate on the merits. See Appellant's Supp. App. 12-20 (reprinting Tyler v. State, No. WD 42318 (Mo. Ct. App. 1996), and State v. Tyler, No. WD 29846 (Mo. Ct. App. 1996)). The State does not answer these citations. Instead, it invites this Court to dismiss Clemmons's claim "on equitable concerns alone" based on the time (seven years) that had passed between the rejection of his direct appeal and his second motion to recall the mandate. We decline to prevent petitioner from raising an obviously meritorious claim solely on the basis of uncertain "equitable concerns." Procedural bars must be firmly and regularly applied, and the State does not argue that such a bar exists against successive motions to recall the mandate. Nor does it assert that the passage of time has made answering the Confrontation Clause claim on the merits more difficult.

We have no trouble concluding that the failure of Clemmons's lawyer to raise the Confrontation Clause claim on direct appeal was ineffective assistance of appellate counsel, and that it thus provides cause for

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[8] The contrary view we expressed in the initial panel opinion, see 100 F.3d at 1402, appears to have been mistaken.

Clemmons's failure to raise the claim on direct appeal in the state court. As we discuss below, the merits of Clemmons's claim were obvious at the time of Clemmons's direct appeal. See Banks v. Reynolds, 54 F.3d 1508, 1515 (10th Cir. 1995) (failure to raise "dead-bang winner" claim on appeal constitutes ineffective assistance of appellate counsel even though counsel may be raised other strong but ultimately unsuccessful claims). (The substantial merits of the claim provide the necessary prejudice to excuse the default). The State argues that Clemmons's appellate counsel could not have raised this claim on direct appeal because Clemmons failed to preserve it for appeal in his motion for a new trial. But Clemmons's pro se motion for a new trial states, "The court denied defendant the right to confront his accuser [six], when the court allowed the State to read to the jury and into evidence the deposition of Mr[.] Gross. Said conduct was unconstitutional and unnecessary in that this witness was not legally unavailable, and in fact could have been subpoenaed [six] to testify." Thus, Clemmons did state in his motion for a new trial that his Confrontation Clause rights were violated by the admission of Captain Gross's testimony.

Clemmons also presented his claim in the state 29.15 proceedings.[9] The 29.15 trial court in its findings and conclusions, rejected Clemmons's Confrontation Clause claim on the ground that the Gross deposition was taken "with the consent of the Movant." This

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[9] The State does not argue that the Confrontation Clause claim was not cognizable in a 29.15 proceeding. Compare 100 F.3d at 1403 n.7.

finding is directly contradicted by the record. Clemmons testified at the 29.15 hearing that he had not known that his lawyer had taken a deposition of Captain Gross, and that he did not find out about the deposition until trial, when the prosecutor was discussing the introduction of the transcript with the judge. 29.15 Hearing Tr. 121. There is no evidence to the contrary in the record.

The State argues that Clemmons did not properly present his Confrontation Clause claim to the Missouri Supreme Court in the 29.15 appeal. As Clemmons argues, he attempted to bring this issue to the attention of the Missouri Supreme Court, first by instructing postconviction counsel to raise it, and then by filing his own pro se brief incorporating pleadings that raised it.[10] As we have held in Part II of this opinion, these efforts by Clemmons were sufficient to present the issue to the Missouri Supreme Court. The State points to no authority suggesting that there is a state rule that is "strictly or regularly adhered to" see Grubbs v. Delo, 948 F.2d 1459, 1462 (8th Cir. 1991), cert. denied, 506 U.S. 835 (1992), that prohibits the filing of pro se briefs by parties already represented by counsel. Clemmons, on the other hand, points to authority demonstrating that "such pro se briefs have been accepted by the Missouri Supreme Court in other cases." Appellant's Supp. Br. 31 (citing State v. Peterson, 518 S.W.2d 1, 2 (Mo. 1974)).

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[10] In a pro se submission to the 29.15 trial court Clemmons asserted that the admission of the Gross deposition "denied Movant his right to confront [witnesses] against Movant." See Clemmons's 2d Addendum to Rule 27.26 Motion.

C.

Thus, no procedural bar prevents us from considering Clemmons's Confrontation Clause claim on the merits. The State next argues that Teague v. Lane, 489 U.S. 288 (1989), precludes our consideration of Clemmons's Confrontation Clause claim. Teague and its progeny prohibit federal courts from resolving habeas claims based on rules of constitutional law that were not "dictated by precedent" existing at the time that the habeas petitioner's state conviction became final. 489 U.S. at 301 (plurality opinion). Far from being a "new rule" of constitutional law, however, Clemmons's claim presents a paradigmatic violation of the Confrontation Clause as it has been traditionally interpreted by the Supreme Court.[11]

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[11] We assume without deciding that when the Court says "firmly dictated by precedent," it means Supreme Court precedent. See Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J. concurring) (state courts not obligated by the Supremacy Clause to follow circuit precedent); see also Glock v. Singletary, 65 F.3d 878, 885 (11th Cir. 1995) (en banc) ("[C]ourts of appeals do not 'dictate' a particular rule to state courts" for purposes of Teague analysis.), cert. denied, 117 S.Ct. 225, 616 (1996). We thus do not consider Don v. Nix, 886 F.2d 203 (8th Cir. 1989). That case, which was decided shortly after Clemmons's conviction became final anyway, held that the defendant "clearly had a right to attend" a deposition admitted into evidence because "the right to confront an accuser means . . . the right to be physically present when the accusations that the jury will hear are made." Id. at 206. We also note that the

Since its original interpretation of the Confrontation Clause in Mattox v. United States, 156 U.S. 237 (1895), the Supreme Court has determined that

> The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, ,but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeaner upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 242-43; see also Maryland v. Craig, 497 U.S. 836, 845 (1990) (quoting this passage); Coy v. Iowa, 487 U.S. 1012, ,1017 (1988) ("'[T]he Confrontation Clause provides two types of protection for a criminal defendant:

Missouri Constitution requires that the Confrontation Clause rights of a defendant be protected for any pretrial depositions to be used in lieu of trial testimony. Mo. Const. Art. I, §18(b); see State v. Jackson, 495 S.W.2d 80,87 (Mo. App. 1973) (Pretrial deposition taken without present or consent of defendant "unusable by the state . . . because it was constitutionally and basically unacceptable for any purpose.") (emphasis in original).

the right physically to face those who testify against him, and the right to conduct cross-examination.'") (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1989) (plurality opinion)).

Clemmons was denied the right to face-to-face confrontation with one of his two accusers (the other being Steigerwald), the right to have the jury observe the witness's demeanor, the right to participate in the cross-examination of the witness, and the right to observe the witness against him, in short every single element of the right of confrontation. This is not a violation about which reasonable jurists may disagree, see Sawyer v. Smith, 497 U.S. 227, 234 (1990), nor are these mere general principles which require jumps in reasoning to conclude that Clemmons's rights were violated, id. at 236. Instead, they are concrete requirements circumscribed only in rare situations "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Craig, 497 U.S. at 850. So far the Court has held that only protecting victims of child abuse from face-to-face confrontation with their alleged abuser justifies departure from the norm of face-to-face confrontation. In addition, we note that even in Maryland v. Craig, where the State had allowed a child to testify against her alleged abuser by closed-circuit television, the jury still had the opportunity to view the child's demeanor, the defendant had the opportunity to participate in the cross-examination of the witness, and the defendant had the opportunity to observe the witness. Nor is there any plausible argument that Captain Gross's testimony is so inherently reliable that cross-examination before the trier of fact in front of Clemmons and the jury

would have been of only marginal value. See Ohio v. Roberts, 448 U.S. 56, 66 (1980) (to be admissible, hearsay must possess particularized guarantees of trustworthiness that make such a statement as reliable as a "firmly rooted" hearsay exception). Accordingly, we hold that Teague is not an obstacle to our consideration of Clemmons's claim.

As we have shown above, Clemmons consented neither to the taking of the deposition nor to its admission in evidence against him at trial. The State does not argue that the right was waived either by Clemmons himself or by his counsel, and, in any event, the law seems to be clear that the right of confrontation is personal and fundamental and cannot be waived by counsel. See, e.g., Brookhart v. Janis, 384 U.S. 1, 7 (1966). Nothing in this record remotely approaches a waiver by Clemmons of this fundamental right. There is a presumption against the waiver of constitutional rights, see, e.g., Glasser v. United States, 315 U.S. 60, 70-71, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464." Brookhart, supra, 384 U.S. at 4.

The State does argue that the error was harmless. More precisely, it asserts that "petitioner fails to demonstrate that the error was not harmless." Appellee's Supp. Br. 20. This formulation would turn the law upside down. Confrontation is a "fundamental requirement,'" Lee v. Illinois, 476 U.S. 530, 540 91986) (quoting Painter v. Texas, 380 U.S. 400, 405 (1965)). Under our precedents where, as here, the state courts

have not themselves engaged in a harmless-error analysis with respect to the particular point at issue, we can hold an error harmless only if the State establishes harmlessness beyond a reasonable doubt. In other words, in such a situation, the standard of Chapman v. California, 386 U.S. 18 (1967), applies. See, e.g., Orndorff v. Lockhart, 998 F.2d 1426, 1429 (8th Cir. 1993), cert. denied, 511 U.S. 1060, 1063 (1994). The State has not even begun to meet this exacting standard in the instant case. We do not know whether Captain Gross's testimony would have been different nor do we know to what extent it might have been different had Mr. Clemmons been notified and allowed to be present. That is, however, exactly the point. The burden is on the State here to show harmlessness, and it cannot do so.

IV.

The failure to disclose the Gross memorandum and the admission of Captain Gross's testimony by deposition are both violations of fundamental constitutional rights which independently justify reversal of Clemmons's conviction.[12] The judgment is reversed and the cause remanded to the District Court with instructions to enter a new judgment granting the writ of habeas corpus, thus vacating Clemmons's conviction. The State of course is free to retry him, and he will

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[12] Clemmons also argues that his trial counsel was ineffective in failing to preserve for appellate review the order of the trial court excluding the testimony of one Robert E. Lee. We reject this argument without extended discussion.

remain in custody because of his convictions for other crimes.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-1086WM

ERIC CLEMMONS,	*	
	*	
Appellant,	*	
	*	On Appeal from the United
v.	*	States District Court for
	*	the Western District of
PAUL DELO,	*	Missouri.
	*	
Appellee.	*	

Submitted: June 13, 1996

Filed: November 22, 1996

Before RICHARD S. ARNOLD, Chief Judge, FLOYD R. GIBSON, Circuit Judge, and KORNMANN, District Judge.

RICHARD S. ARNOLD, Chief Judge.

Eric Clemmons, the petitioner, has been sentenced to death for killing a fellow inmate at the Missouri State

Penitentiary. Exculpatory evidence was apparently withheld from Clemmons by the State prior to his trial. In addition, evidence that was important to the State's case came in by deposition, raising serious issues under the Confrontation Clause. The District Court[1] held, however, that both these claims were procedurally barred. After thorough consideration, we affirm, though not altogether for the same reasons.[2]

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[1] The Hon. Howard F. Sachs, United States District Judge for the Western District of Missouri.

[2] Petitioner also argues that certain claims made in his habeas petition were admitted by the State when (according to him) it failed to deny them in a timely fashion, and that his trial counsel was ineffective in failing to object to certain allegedly improper actions of the prosecutor, in failing to ask on voir dire whether potential jurors would automatically vote for the death penalty, in failing to conduct voir dire on the presumption of innocence, in failing to present certain mitigating evidence, including character witnesses, accomplishments of the defendant, and psychological testimony, and in failing to make an offer of proof of the testimony of one Robert E. Lee. We have considered these arguments and reject them, substantially for the reasons given in the District Court's opinion.

I.

The District Court and the Missouri Supreme Court have rendered careful and detailed opinions reciting the facts in this case. Clemmons v. Delo, No. 90-0943-CV-W-6, slip op. (W.D. Mo. July 7, 1995); State v. Clemmons, 753 S.W.2d 901 (Mo.) (en banc), cert. denied, 488 U.S. 948 (1988). We will summarize them here only to the extent necessary for our review.

On August 7, 1985, Clemmons was an inmate at the Missouri State Penitentiary. Shortly before 9:00 that evening, Corrections Officer Thomas Steigerwald, while walking towards a group of inmates standing near Housing Unit 3, observed one of the inmates grab another, strike him in the chest, and then hit him with a roundhouse punch in the side. Henry Johnson, the inmate who had been struck, ran past Steigerwald to the entrance to the main corridor. As he did so, Steigerwald noticed blood on Johnson's shirt. It was then that Steigerwald realized that a stabbing had occurred.

Steigerwald called for backup on his radio and began to pursue the inmate whom he had seen striking Johnson. That inmate, who was wearing a gray sweatshirt, and another inmate, who was wearing a gray towel around his head, began to move towards the prison chapel. Eventually, these inmates separated, and Steigerwald decided to pursue the one in the gray sweatshirt. He testified that he saw the faces of both inmates, as well as a knife in the hand of the inmate in the gray sweatshirt.

Steigerwald eventually caught up with the inmate in the sweatshirt, who was Clemmons. By that time the sweatshirt had been turned inside out so that it appeared to be white. There was human blood on the gray part of the sweatshirt, though it could not be typed. No knife was ever found.

The inmate in the gray towel was also caught. When his cell was searched, a hat and a school book belonging to Clemmons were found. The book was splattered with blood. The inmate had been seen entering the housing unit carrying the hat and the book shortly after the stabbing. The blood spatters on the hat were human blood of either type B or type AB. Johnson, the victim, had type B blood.

Johnson later died. An autopsy revealed that he had been stabbed three times. The fatal blow was to the left side of his chest and penetrated his heart. He also sustained a stab wound to his left side and another under his right arm. A scratch on his shoulder was also discovered, but it is uncertain whether the scratch was inflicted at the same time as the three stab wounds. Prior to his death, Johnson exclaimed, "they have stuck me in my heart."

Clemmons was charged with murdering Johnson. At his trial, there were two pieces of particularly damaging evidence against him. The first was Steigerwald's testimony identifying him as the person who struck Johnson and as having a knife. The second was testimony from Captain A. M. Gross that Clemmons had stated in Gross's presence, "I guess they got me." Clemmons's defense was that another inmate, Fred

Bagby, had killed Johnson, and several inmates testified more or less to that effect. According to Clemmons, what Steigerwald saw was Johnson running into Clemmons after Bagby had already stabbed Johnson. Bagby had died by the time of trial, and the State argued that the testimony of Clemmons's witnesses should be discounted because it was easy for them to try to help Clemmons by blaming someone (Bagby) who could not defend himself.

Clemmons was found guilty. In the penalty phase, several aggravating circumstances were alleged. Most notably, Clemmons was a prisoner under sentence of life imprisonment without possibility of parole for 50 years for another murder when Johnson was killed. The jury sentenced Clemmons to death.

II.

Clemmons alleges that exculpatory evidence was withheld from him prior to his trial in violation of Brady v. Maryland, 373 U.S. 83 (1963). Following Clemmons' direct appeal, he discovered an important piece of evidence. On the very day that Johnson was killed, a Department of Corrections inter-office communication was written by Captain A. M. Gross, the same Captain Gross who testified against Clemmons, stating that another inmate had accused Fred Bagby of killing Johnson. The inter-office communication reads as follows:

> On the above date at approximately 9:30 P.M. I was searching the upper yard for evidence in the stabbing that had taken

> place about 8:55 P.M. on inmate Johnson, Henry . . . when I met and interviewed inmate Clark, Dwight . . . . Clark said that he had witnessed the assault on Johnson, and that he had seen two (2) men stabbing Johnson. He described both assailants as being black, and he thought one was inmate Fred Bagby but only knew the second inmate by sight. When questioned in detail Clark did not make sense and further investigation reflects that Clark's statement is untrue.

This evidence was not provided to Clemmons' attorney, despite a discovery request for "[a]ny material or information . . . which tends to negate the guilt of the defendant."[3]

Clemmons raised the failure to disclose this memo in his initial postconviction motion under Rule 29.15 of the Missouri Rules of Criminal Procedure. The memo itself was introduced in evidence at the 29.15 hearing without objection from the State. Clemmons did not,

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[3] The State contends that the memorandum was in Johnson's inmate file, which was reviewed by trial counsel for Clemmons. We agree with the District Court that "[t]here is little need to resolve the [issue]." Slip op. 13. "[I]f the memorandum was in the victim's file, but was not examined or was discounted by [trial counsel]," ibid., a claim of ineffective assistance of counsel would arise that would be just as strong or just as weak, as the case may be, as the Brady claim Clemmons now presses.

however, call Clark as a witness, even though he had subpoenaed Clark, and Clark was available to testify. In fact, Clemmons himself specifically chose not to call Clark as a witness.

The 29.15 court denied Clemmons' motion, but did not discuss the Brady issue. Clemmons then appealed to the Missouri Supreme Court. See Clemmons v. State, 785 S.W.2d 524 (Mo.) (en banc), cert. denied, 498 U.S. 882 (1990) (affirming denial of postconviction relief). There, however, his lawyer, contrary to repeated instructions from Clemmons, failed to raise the issue of the undisclosed evidence. Clemmons, in an effort to save the issue, attempted to file a pro se supplemental brief with the Missouri Supreme Court, but his motion for leave to file the brief was denied.

Clemmons once again raised the Brady issue in his petition for a writ of habeas corpus before the District Court. That Court held that the claim was procedurally barred.

A.

As we have seen, the Brady claim was raised in the trial court on Clemmons' petition for postconviction relief under Rule 29.15. The Gross memorandum was introduced into evidence by petitioner, without objection from the State. Moreover, there was not then, nor is there now, any claim by the State that the memorandum was a fabrication or was for any reason not authentic. It is true that petitioner did not call Clark as a witness at the postconviction hearing, though Clark had been transported from the prison in order to testify and was

readily available for that purpose. We cannot agree, however, that the failure to call Clark operated as a waiver of the Brady claim itself, though, if the merits of the claim are to be reached, our consideration will have to be limited to the memorandum, and cannot include the testimony given by Clark at the federal habeas hearing. See Keeney v. Tamayo-Reyes, 504 U.S. 1, 8-10 (1992) (holding that factual development of a claim must take place in the state courts).[4]

Petitioner's difficulty stems from the fact that the Brady issue was not raised in the appeal from the denial of postconviction relief. Omission of this issue was a serious mistake by Clemmons' appointed counsel, perhaps the sort of mistake that, if committed at trial or on direct appeal, would amount to ineffective assistance in violation of the Sixth and Fourteenth Amendments, but error of this kind on the part of postconviction counsel cannot be "cause" to excuse a procedural default. See Coleman v. Thompson, 501 U.S. 722, 753 (1991); Nolan v. Armontrout, 973 F.2d 615 (8th Cir. 1992).

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[4] We do not know why petitioner decided not to call Clark. We do know that this decision was made by petitioner himself, not by post-conviction counsel. There may be a reasonable inference here that petitioner had spoken with Clark privately and had determined that Clark's testimony would not help him. Clark testified later, at the evidentiary hearing in the federal habeas court, and his testimony was quite favorable to petitioner, but this does not necessarily mean that Clark would have testified to the same effect at the time of the State post-conviction hearing.

What we have here, however, goes beyond a mere omission on the part of counsel. After counsel had been appointed to represent Clemmons on his 29.15 appeal (counsel different from the lawyer who had represented him in the postconviction trial court) Clemmons wrote the new lawyer to request that he be kept informed. He specifically stated that he wanted all of his issues preserved. Appointed counsel, however, filed a brief in the 29.15 appeal without giving Clemmons an opportunity to review it and without including in the brief all of the issues previously raised in the trial court. Petitioner then wrote counsel and instructed him to file a supplemental brief raising the additional issues. Clemmons specifically drew the attention of counsel to the danger that issues not raised would later be held not to have been properly presented. "I want you to lay the ground work so if the Missouri Supreme Court refuse [sic] to hear [the unbriefed issues] the record will clearly show we tried to present them." Letter of December 26, 1989, App. 270. Counsel refused, stating that he had "made every argument on your behalf that I felt could be supported by law and evidence." Letter of December 29, 1989, App. 271.

Clemmons then made a motion in the Missouri Supreme Court for leave to file a supplemental brief pro se. This motion recites that appointed counsel had filed a brief raising only six points, that Clemmons had requested in writing that every other ground preserved by the record also be raised, and that counsel had refused this request. The motion further states that no fewer than 130 additional points should have been raised. It asks the Court to accept a number of documents "as a supplemental brief in this cause," including the original

and first amended 29.15 motions, both of which documents, presumably, were in the record before the Missouri Supreme Court. The Court denied the pro se motion without comment. The documents referred to in the motion included the Brady issue now under discussion.

As noted above, we agree with the State that mistakes made by counsel in postconviction proceedings do not constitute "cause" for habeas purposes. The initial question, though, is not whether there was cause to excuse a procedural default, but whether there was a default in the first place. In other words, did Clemmons fairly present his Brady claim in the state courts? In the perhaps unique circumstances of this case, we think the answer is yes.

It is perfectly true that counsel does not have to present every issue appearing in the record. In fact it could be bad lawyering to do so, especially when there are so many potential issues. As counsel remarked in his letter to Clemmons, "[y]ou can't expect every single allegation to hold up in court, and it's not the number of allegations that matters anyway. One good issue is better than a thousand others." App. 271. The client, however, is and always remains the master of his cause. Here, Clemmons did the only thing he could do: he tried to bring the issue to the attention of the Missouri Supreme Court himself. We do not criticize that Court for refusing leave to file the supplemental brief. Such matters are within the Court's discretion. Our own practice is usually to refuse leave to file supplemental

briefs in cases in which counsel has appeared.[5] The fact remains that Clemmons called the attention of the Supreme Court of Missouri to his Brady claim, among many others. We do not know what else he could have done, as a practical matter, to present the claim to that Court for decision on the merits.[6] We therefore hold that

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[5] In the present case, we have before us three pro se filings. First, a pro se supplemental brief was received on May 13, 1996. The motion for leave to file this brief is granted. Second, we received on June 10, 1996, an additional document styled "Oral Argument Written Statement." We have considered this document. Third, on September 3, 1996, Clemmons filed a pro se motion to supplement the record. This motion is granted, and we have considered the materials attached to it. This Court's normal practice is to refuse pro se filings from clients who are represented by counsel. We have departed from our normal practice in this case for two reasons: Clemmons' history of difficulty with previously appointed counsel, and the fact that this is a death-penalty case.

[6] At the evidentiary hearing on this habeas petition, the District Court suggested that Clemmons could have fired his lawyer and then filed his pro se brief. No doubt a client can always discharge his lawyer, but the suggestion does not seem practical in the present circumstances. When Clemmons learned, after the fact, that his lawyer had violated his instructions by filing a brief omitting issues the client wanted raised, oral argument was only about a month away. Clemmons could have asked for appointment of new counsel to

the claim was fairly presented, and that the merits are now open for decision on federal habeas corpus.

B.

The question to be answered is this: If the Gross memorandum, but not Clark's live testimony, had been before the state trial court, how would the case have been different? In order to succeed, Clemmons must show a reasonable probability that the outcome would have been different. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.) (adopted by the Court in Kyles v. Whitley, 115 S. Ct. 1555, 1566 (1995)).

Petitioner does not have to show that he would more likely than not have been acquitted if the withheld evidence had been before the jury. "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . ." Kyles v. Whitley, supra, 115 S. Ct. at

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make the argument and file a supplemental brief, but he had no way of knowing whether such a motion would be granted. (Nor do we.). If he thought about this alternative, he could reasonably have concluded that it would not be in his best interest to risk having no lawyer at all to argue his case. We do not normally order the release of inmates from jail to argue their appeals pro se, and we assume the practice of the Supreme Court of Missouri is similar.

1566. The question is rather whether the defendant, in the absence of the evidence in question, "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Ibid. Further, petitioner does not have to show that "after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Ibid.

We have read the entire transcript of the guilt phase of the trial as it actually occurred in 1987. What would the evidence have looked like if the defense had been given, and had used, the later-discovered Gross memorandum dated August 7, 1985? The main support for the State's case, the eyewitness testimony of Officer Steigerwald, would be unchanged. Steigerwald's testimony was clear, consistent with the physical evidence about the location of blood, and unshaken on cross-examination. It was almost dark when the incident began, and Steigerwald was a considerable distance away, but he was within 10 or 12 feet of Clemmons (the inmate in the gray sweatshirt whom he had seen strike Johnson) when he saw the knife in his hand. There is absolutely no reason to suspect that Officer Steigerwald fabricated any part of his testimony, and no one suggests that he did so. It is always possible, of course, that he was mistaken, but, to the extent that the written page conveys an impression, we find his testimony convincing.

The other major witness for the State was Captain A. M. Gross, who testified about the admission Clemmons is supposed to have made the next morning. Clemmons now denies that he made any such statement, but not much in the way of a concrete reason for

disbelieving Captain Gross is suggested. Presumably the Clark memorandum would have been used by the defense during the cross-examination of this witness. Also presumably, the witness would have admitted, after seeing the memorandum, that Clark had identified Bagby as the culprit immediately after the incident, at a time when Bagby was still alive. The memorandum, however, does not cut all one way. It ends with the following sentence: "When questioned in detail Clark did not make sense and further investigation reflects that Clark's statement is untrue." If the matter had been pursued on cross-examination, Gross would probably have given his reasons for making this statement. In the alternative, the State could have brought out his reasons on redirect. In either event, we think it likely that the impact of the first portion of the memorandum would have been somewhat diminished.

The fact that Clark had accused Bagby before Bagby's death would, to be sure, have been useful to the defense in connection with the State's attack on the credibility of defense witnesses. Three inmates, Justice Mays, Seymour G. Abdullah, and Keith Brown, testified for the defense. On direct examination, Mays testified unequivocally that the victim, Johnson, hit Bagby in the face, and that Bagby then pulled a knife and stabbed Johnson three times. Johnson then ran and bumped into Clemmons, the defendant. On cross-examination, however, Mays' testimony was seriously undermined. When he realized that he had placed the location of the alleged collision between Johnson and Clemmons at a place nowhere near the trail of blood found on the ground, he changed his testimony about the location.

This change was highlighted during the State's closing argument to the jury.

Seymour Abdullah also identified Bagby as the perpetrator, and it was during cross-examination of this witness that the State referred to Bagby as "conveniently dead." Tr. 44B. According to Abdullah's version of the facts, however, it was Bagby, not Johnson, who had a collision with Clemmons, and Abdullah admitted that he saw no blood at the location of this collision (The importance of the collision, according to the theory of the defense, is that it provides an explanation for the blood on Clemmons' sweatshirt).

The final witness was Keith Brown, the inmate who, according to Officer Steigerwald, ran away from the scene with Clemmons and ended up with Clemmons' hat and book in his cell. Brown testified that there was a scuffle, and that Johnson began running, with Bagby right behind chasing him. Brown was less certain about the collision. He thought that Johnson appeared to have bumped into Clemmons, or another inmate named Lewis, or someone else. He then left the scene but returned to pick up some papers of his own. It was then, he said, that he happened to see a hat and some papers lying on the ground, which he picked up and took to his cell. On cross-examination, he gave confused and evasive answers about his activities in the vicinity of the chapel. His version of the facts did not appear to be consistent with the location of the chapel door.

In his closing argument, counsel for the State stressed Officer Steigerwald's unequivocal identification of the defendant. He observed that the location of the

trail of blood was inconsistent with the defendant's statement to Officer Brooks as to where he was standing when the victim, Johnson, brushed or bumped against him. Steigerwald had no reason to lie, counsel stressed, and there was no blood where the defense witnesses had placed the altercation. Counsel also referred to "the conveniently deceased Mr. Bagby," Tr. 500, but added that both Mays and Abdullah appeared to be uncertain as to whether Bagby or the victim collided with Clemmons. Towards the end of his argument, another reference was made to the fact that the defense witnesses were blaming the crime on a dead man. Tr. 504.

We take it that if the Clark memorandum had been used in cross-examining Captain Gross, as indicated above, the State would have omitted the argument about Bagby's being dead at the time of trial -- though it still might have been logical to point out that the three live witnesses actually called, Mays, Abdullah, and Brown, had waited until Bagby's death to accuse him. However that may be, most of the State's case, including notably Officer Steigerwald's eyewitness account and Clemmons' arguable admission, would have been untouched. We are acutely mindful that "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." Burger v. Kemp, 483 U.S. 776, 785 (1987). We take this responsibility extremely seriously, as the District Court did. Having considered the matter with the care that it deserves, we are simply unable to say that our confidence in the verdict is sufficiently reduced. The standard, unfortunately but perhaps necessarily, contains some element of subjectivity. We suppose that any piece of evidence favorable to the defense -- and the Clark

memorandum certainly falls in this category -- must have some tendency to undermine one's confidence level, so to speak. It is dangerous and perhaps misleading to try to express these matters in quantitative terms. The judgment we have to make is a qualitative one. The closest we can come to expressing it clearly is this: as the case was actually tried, it seems to us that the defense had only a rather small chance of prevailing. We do not think that the Clark memorandum would have increased this chance more than marginally. We still have confidence in the verdict of guilty, and it is, accordingly our bounden duty to reject Clemmons' Brady claim.

III.

We turn now to the other major contention made by Clemmons on this appeal -- that his rights under the Confrontation Clause were violated by the use against him of the deposition of Captain A. M. Gross. Clemmons' lawyer did not inform him of the deposition in advance, he was not present when it was taken, and he did not thereafter consent to its being used against him at trial (The lawyer decided to take the deposition as a courtesy to Gross, whose wife had died immediately before the trial). We agree with the District Court that this contention, if open for decision on the merits in this federal habeas proceeding, would be a substantial one. See Don v. Nix, 886 F.2d 203, 206 (8th Cir. 1989) (holding that "the right to be physically present when the accusations that the jury will hear are made" extends to pretrial depositions intended to be used at trial).

The District Court held, however, that the contention was procedurally barred by petitioner's failure to raise it in the proper fashion in the state courts. Before addressing this issue directly, we briefly describe and put to one side two subsidiary contentions made by the parties. First, the State argues that petitioner never actually made a Confrontation Clause claim in the District Court. The claim, rather, was that petitioner's trial counsel had been ineffective for allowing the State to use a deposition taken when petitioner was not personally present. We assume for present purposes that the District Court was correct in believing that petitioner had made a Confrontation Clause claim as such, and not just an ineffective-assistance claim based on counsel's failure to preserve his client's right of confrontation.

Second, petitioner argues that the State never pleaded "nonexhaustion" in the District Court with respect to his Confrontation Clause claim. Any objection to consideration of the claim on its merits was, therefore, waived, the argument runs, and it was error for the District Court not to reach the merits. We reject this argument. We believe it rests on confusion between the doctrines of exhaustion and procedural bar. It is true that the State did not plead nonexhaustion as a defense, but exhaustion refers to the present availability of state remedies. If no state remedies are presently available for adjudication of a federal claim, exhaustion of remedies has occurred, and this is true whether the absence of state remedies is due to the state courts' having already considered the claim, or to a petitioner's failure to raise the claim at some earlier, proper time. In other words, a claim that is procedurally barred is, by definition, an exhausted claim. The District Court's opinion does state

that the claim "has not been exhausted before the Missouri courts, and has, therefore, been waived as procedural error under state law," slip op. 7, but we read this statement as simply an informal way of saying that the claim was never properly raised in the state courts and is therefore now procedurally barred. As the remainder of the District Court's opinion shows, that Court did not intend to say that the Confrontation Clause claim had been exhausted in the state courts, in the sense of having been raised and decided there. Quite the contrary: the District Court explained at length its reasons for holding that the claim had not been properly raised in the state courts, and that, therefore, it was procedurally barred. We now turn to this issue.

In his brief to this Court, petitioner argues that the claim was properly raised on direct appeal. The motion for new trial filed by counsel does refer to the right of confrontation, and petitioner's own pro se motion for new trial directly claims that "[t\he court denied defendant the right to confront his accuser, when the court allowed the State to read to the jury and into evidence the deposition of Mr. Gross." Brief for Appellant 35. However, appellate counsel on the direct appeal, not the same as trial counsel, did not raise the Confrontation Clause issue in her brief. Petitioner argues that the issue was preserved when he filed a motion to recall the mandate and claimed ineffective assistance of appellate counsel. As we understand Missouri practice, a motion to recall the mandate, at least on direct appeal, is a proper way (perhaps the only proper way) to claim ineffective assistance of appellate counsel. The trouble with this point for present purposes is that petitioner's motion which we have examined, though it does charge appellate

counsel with ineffective assistance in several respects, says nothing about the Confrontation Clause. Nor does the motion refer to or incorporate any documents that would have alerted the Supreme Court of Missouri to the Confrontation Clause argument. The pages of the appendix which petitioner cites in this connection, 284-85, are entirely devoid of any reference to this issue. We do not think that a general allegation of ineffective assistance of appellate counsel, without elaboration, is sufficient to raise any particular instance of the allegedly ineffective assistance. Still less is a motion specifying certain grounds of ineffective assistance adequate to alert a court to any particular other ground. Petitioner's motion does claim that appellate counsel was ineffective in failing to brief as plain error "[t]he other allegations of trial counsel's ineffectiveness," App. 285, but nothing is said to particularize these grounds, nor, again, is any reference made to the Confrontation Clause or, indeed, to Captain Gross' deposition in any connection.

Petitioner has now filed a second motion to recall the mandate, and this motion does clearly refer to the Confrontation Clause issue. The Supreme Court of Missouri denied the motion on October 20, 1995, while this habeas case was pending before the District Court. The Supreme Court denied this motion without comment. We have no reason to believe that the denial was on other than procedural grounds. No authority has been cited, nor are we aware of any, that would support the filing of second or successive motions to recall the mandate. If such filings were permitted, there would be no particular incentive to include in one's first motion to recall the mandate all grounds of ineffective assistance of appellate counsel then know or available. The Missouri

Supreme Court's order does not state that it is based on procedural grounds, but we believe we are safe in concluding that it was. There is simply no reason to conclude that the federal claims were rejected on their merits, or were interwoven with claims that were decided on their merits. See Jolly v. Gammon, 28 F.3d 51, 53 (8th Cir.), cert. denied 115 S. Ct. 462 (1994). Petitioner also attempted to raise this issue by original petition for writ of habeas corpus in the Missouri Supreme Court under Mo. Sup. Ct. R. 91, but, again, this petition was summarily denied without comment, and we have no reason to believe that this denial represented a ruling on the merits of the Confrontation Clause issue. See Byrd v. Delo, 942 F.2d 1226, 1231-32 (8th Cir. 1991).

Petitioner also contends that the Confrontation Clause issue is preserved for federal review by reason of having been urged in his state postconviction proceeding.[7] The 29.15 trial court, in its findings and

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[7] We assume, without deciding, that ineffective assistance of direct-appeal counsel can be raised in a 29.15 postconviction petition. We observe that the assumption seems questionable. We are aware of no authority so holding, and the appellate court, which unquestionably can consider the issue on motion for recall of mandate, would be more familiar with counsel's performance before it. In addition, if I can raise the point in my 29.15 petition anyway, why bother to move the appellate court to recall its mandate? On the other hand, the 29.15 trial court in the present case did consider the Confrontation Clause issue and reject petitioner's claim on the merits, so the claim, absent

conclusions, rejected the argument on the ground that the Gross deposition was taken "with the consent of the Movant." Respondent's Exhibit G, p. 235. This finding was not supported by the record, there having been no testimony to support it, and no one now defends it. Petitioner's problem is that there was no evidence in the postconviction record one way or the other on the issue. At the postconviction hearing in state court, petitioner testified, but he said nothing about not having been given an opportunity to be present during the Gross deposition. Petitioner's counsel did not call trial counsel. He testified only when called by the State, and his testimony did not include any reference to petitioner's presence vel non at the Gross deposition. Indeed, as the District Court remarked, slip op. 8 n.6, the dispositive finding [that petitioner had consented to the Gross deposition] does not seem to have been challenged by petitioner or counsel prior to the proceeding in this court."

As we have previously noted, those who would attack a conviction are obligated to develop the material facts in the state courts. "[A] state prisoner's failure to develop material facts in state court" can be excused only if petitioner demonstrates cause for this lack of development, and prejudice resulting from it. See Keeney v. Tamayo-Reyes, supra, 504 U.S. at 8. Prejudice there may be, due to the evident substantiality

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some other default, would be cognizable on habeas in the present case even if state procedural law would not normally allow it in a 29.15 proceeding. See, e.g., Hadley v. Caspari, 36 F.3d 51 (8th Cir. 1994) (per curiam).

of the Confrontation Clause issue, but we see no "cause" as that word has come to be defined in the cases. It may have been inexcusable neglect, in the sense of a lawyer's obligation to a client, not to have either petitioner or trial counsel testify that Clemmons had not agreed to the use at trial of the Gross deposition, but this sort of omission by postconviction counsel cannot, as a matter of law, qualify as "cause." See, e.g., Coleman v. Thompson, supra; Nolan v. Armontrout, supra.

Petitioner points out that he attempted to bring the issue to the attention of the Missouri Supreme Court, first by instructing postconviction appellate counsel to raise it, and then by filing his own pro se brief incorporating pleadings that raised it. As we have held in part II of this opinion, these efforts by petitioner were, in our view, sufficient to present the issue to the Missouri Supreme Court. The problem is that there was nothing, factually speaking, to present. If the Missouri Supreme Court had addressed the Confrontation Clause claim, there would have been no testimony or other evidence before it to justify a reversal of the 29.15 trial court.

No doubt all of this seems more than somewhat technical. The basic principle, however, is simple and easily understood: in order to get a federal habeas court to consider on its merits an attack on a state-court conviction, the facts said to justify the attack must first have been fully developed in the state courts, unless a petitioner can show some good reason, recognized in the law, that prevented him from doing so. The state courts are and must be the primary forum for the administration of the criminal law, and a due regard for their

competence requires us to respect those procedural rules that require the underlying facts, absent some adequate cause, to be presented in the first instance in the state system.

IV.

For the reasons we have attempted to explain in this opinion, the judgment of the District Court, dismissing with prejudice the petition for writ of habeas corpus, is affirmed. The Brady claim is rejected on the merits. The Confrontation Clause claim is procedurally barred. We thank appointed counsel for petitioner for their diligent and able service.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

ERIC DARNELL CLEMMONS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 90-0943-CV-W-6
	)	
PAUL K. DELO,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

Petitioner Eric Clemmons seeks habeas corpus relief under 28 U.S.C. §2254 from his conviction and the death penalty imposed, as a result of the 1985 stabbing death of a fellow inmate at the Missouri penitentiary. The case has been carefully considered on two occasions by the Missouri Supreme Court. State v. Clemmons, 753 S.W.2d 901 (Mo. en banc 1988); Clemmons v. State, 785 S.W.2d 524 (Mo. en banc 1990).[1] No judge of that court would have reversed the result of the trial, although Judge Blackmar had some concurring comments, not here pertinent. 753 S.W.2d at 914.

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[1] There was also rather elaborate consideration of the post-conviction motion by Circuit Judge Anderson. Resp. Exh. G, pp. 225-251.

Over strenuous objection by the State, this court allowed discovery and held a hearing last year on certain issues not fully developed before. Briefing and the presentations of counsel have been voluminous.

The court is acutely aware of the serious attention that must be paid to a capital punishment case, even after repeated affirmances of convictions and sentences by other courts. See, e.g., Antwine v. Delo, 1995 U.S. App. LEXIS 10474, No. 94-1890 (8th Cir. May 12, 1995); Kyles v. Whitley, 115 S.Ct. 1555, 1576 (1995) ("Sometimes the performance of an unpleasant duty [by the Supreme Court itself] conveys a message more significant than even the most penetrating legal analysis," Stevens, J. concurring). At the same time, I must recognize that focusing on what strikes a judge as the essence of remaining issues may be of more assistance to review than rehashing material that has been adequately covered before or does not seem promising. While mindful that a self-serving declaration that matters have been "carefully reviewed" is often inappropriate, it may be appropriate here to state that I have thoughtfully examined the transcripts of trial proceedings, post-trial proceedings in State Court the hearing conducted before me last year, and certain depositions. Due consideration has hopefully been given to all filings and the entire record.

An adequate understanding of the basic proof supporting the conviction can be gleaned from the generally accurate recitation by the Missouri Supreme Court on the initial appeal:

Defendant and Henry Johnson were cellmates in the Missouri State Penitentiary (MSP). Due to problems between the defendant and Johnson, which they would not specify to correctional officers, defendant was moved to a different cell on about July 1, 1985. The move, according to George Brooks, the chief investigator at MSP, appeared to alleviate the problems between the two inmates and defendant later told Brooks that there had been no further trouble between himself and Johnson.

A little over a month later, ,on August 7, 1985, at shortly before 9:00 p.m., Corrections Officer Thomas Steigerwald walked out of the main corridor of MSP into an open area of the prison grounds called the upper lawn. Immediately after coming onto the upper lawn, Steigerwald saw Morris Cavanaugh, another employee of MSP, and the two exchanged brief greetings.

Both Steigerwald and Cavanaugh noticed a group of inmates standing around in a little circle near the entrance to Housing Unit 3. Most of the inmates in this group appeared to be talking together, but two of them stood a little apart from the rest. One of these two, who was standing between the other inmates and the entrance to the main corridor, was looking

towards that entrance. The other, who was standing between the other inmates and the entrance to Housing Unit 3, was facing the other inmates. Steigerwald could see no signs of ill temper or threatened violence from any of the inmates in the group.

As Steigerwald began to walk toward the group he saw one of the inmates, who was the only one of the group wearing a gray sweatshirt, move a few feet toward another of the inmates, grab that inmate, and strike him in the upper left chest. The inmate in the gray sweatshirt followed this blow up with a roundhouse blow to his victim's left side. At that time Steigerwald did not see a weapon in the attacking inmate's hand and he thought the blows were simply closed fist punches. As Steigerwald continued on toward the group of inmates the inmate who had been attacked, Henry Johnson, ran past Steigerwald to the entrance to the main corridor. He had blood on the front of his shirt and on his pants. Steigerwald then realized that the blows he had seen had been with a knife and he ran toward the inmate in the gray sweatshirt while broadcasting over his radio that a stabbing had occurred and that he needed assistance.

The inmate in the gray sweatshirt started walking with another inmate away from Steigerwald toward the back of the

prison chapel. This other inmate wore what appeared to be a gray towel wrapped around his head and had beads around his neck. When Steigerwald drew within 10 to 12 feet of the two inmates he saw both their faces clearly. Steigerwald also saw a knife sticking out of the right hand of the inmate in the gray sweatshirt. The knife was a flat piece of metal about four or five inches long, with both sides sharpened to where it made a point at the tip. At about this time the inmate wearing the towel and beads broke off from the inmate in the gray sweatshirt, ,dodged around to Steigerwald's right side, and headed back in the direction of the entrance to Housing Unit 3. The inmate in the gray sweatshirt continued on behind the chapel.

Steigerwald, ,choosing to continue after the inmate in the gray sweatshirt, ran around the front of the chapel to cut him off on the other side. The inmate was out of Steigerwald's sight until they approached each other on the other side of the chapel. As they approached each other at that time Steigerwald got another clear look at the inmate but he did not see the knife again. When the inmate saw Steigerwald on the other side of the chapel he turned around and started back the way he had come. Steigerwald also retraced his steps, again losing sight of the inmate while they were on opposite sides of the chapel.

After coming back around the chapel, Steigerwald saw the inmate heading toward the entrance of Housing Unit 3. Steigerwald caught up with the inmate just inside the doors of the Housing Unit and took him into custody. The inmate was identified as defendant Eric Darnell Clemmons. No weapon was found in defendant's possession. A search of the upper lawn and surrounding areas for the knife was also unsuccessful. The weapon was never found.

At the time defendant was taken into custody he was wearing what appeared to be a white sweatshirt instead of the gray sweatshirt Steigerwald had initially seen him wearing. It was soon discovered, ,however, ,that defendant was wearing a gray sweatshirt turned inside out so that the white lining was showing. When the sweatshirt was turned right side out a smear of blood was visible on the right sleeve.

After taking defendant into custody and leaving him at the control center, Steigerwald began looking through Housing Unit 3 for the inmate wearing the towel and beads that he had seen walking with defendant. Steigerwald found this inmate in one of the cells. He was identified as Keith Brown. Corrections officers searched Brown's cell where they

found a hat and a school book which had been splattered with blood. Papers in the school book bore defendant's name and inmate number. A corrections officer reported that he had seen Brown carry this hat and book into Housing Unit 3 shortly after the stabbing had occurred.

While Steigerwald had been pursuing defendant through the upper lawn, Henry Johnson, the victim of the stabbing, ran up to the entrance to the main corridor. Corrections Officer Brian Smith saw Johnson was bleeding profusely from the chest and signaled another officer to open the gate. Smith could not get Johnson to lie down until help arrived so he escorted Johnson to the prison hospital. When Smith asked what happened, Johnson said only that "they have stuck me in my heart." Johnson died shortly after arriving at the hospital.

Approximately an hour and a half after defendant was taken into custody he was questioned about the death of Henry Johnson. Defendant waived his Miranda rights and gave a statement in which he denied stabbing Johnson. While defendant was being taken to a maximum security cell after investigators had finished questioning him, however, he spontaneously remarked to an

accompanying officer, "I guess they got me."

An autopsy revealed the cause of Johnson's death to be a stab wound inflicted on the left side of his chest which had penetrated the left ventricle of his heart. The depth of the wound was about four inches. In addition, Johnson suffered a stab wound to his left side, another under his right arm, and a scratch on his right shoulder which may or may not have been inflicted at the same time as the other wounds. The knife blade which caused the fatal wound and at least the two other major wounds was flat and sharper on one side than the other. The fatal wound must have been inflicted with considerable force because the blade entered Johnson's body perpendicularly to his ribs and thus had to cut, break, or spread the ribs in some way so that the blade could travel as far into the body as it did.

Forensic analysis of the smear of blood found on the sleeve of the defendant's sweatshirt showed that it was human blood, but further tests to type the blood were inconclusive. The blood splatters on the hat found in Keith Brown's cell were found to be human blood of either type B or type AB. Henry Johnson's blood was type B.

The issues for full explication now could include the ten points presented on the initial appeal, the six points presented on appeal in the postconviction proceeding, many additional points referred to in a motion to recall the mandate, and the massive listing of points and subpoints in the first amended petition for habeas corpus, which exceeds 60 pages in length. I shall concentrate on (1) an issue under the Confrontation Clause presented by the taking of very damaging deposition testimony about an admission by Clemmons to Captain A.M. Gross, without petitioner's presence, by consent of counsel but without any expression of consent by petitioner; (2) a Brady issue or ineffective assistance issue presented by the failure to call an independent-minded inmate, Dwight Clark, who was apparently an eyewitness to the stabbing and who immediately broke prison custom by identifying Fred Bagby as the culprit; (3) the exclusion of testimony concerning complaints by Clemmons of homosexual activities by Johnson, which initially attracted my attention. (Doc. 7); (4) the still-pending habeas case in the Eastern District of Missouri which challenges the first murder conviction of Eric Clemmons, which in my judgment must have been the controlling concern of the jury in assessing the death penalty; and (5) the failure of counsel to ask jury panelists if they would automatically favor the death penalty if they found petitioner guilty of murder.

As will be discussed, there are serious and probably fatal procedural objections to getting to the merits of any of these critical points.

(1) Confrontation Clause Violation

One of the most significant items of trial testimony, the alleged admission by petitioner to Captain Gross that "I guess they got me," came in through a deposition of Gross, taken without petitioner's approval as a courtesy extended by Ossman, his trial counsel, when Gross's wife died immediately before trial. Trial Transcript pp. 373, 385 (hereinafter referred to as TT).

It seems established that this was serious, probably fatal error, if properly preserved. An attorney cannot alone waive a right under the Confrontation Clause of the Sixth Amendment. Don v. Nix, 886 F.2d 203 (8th Cir. 1989). It has been established in Missouri for 20 years, presumably to comply with the federal Confrontation Clause as well as state law, that a defendant has a right to be present at the taking of a deposition that will be used at trial. State v. Jackson, 495 S.W.2d 80 (Mo. App. 1973).[2] While immaterial departures from the requirements of the Confrontation Clause have been treated as harmless error in this Circuit (Don v. Nix, supra), the gravity of the evidence submitted in violation of the confrontation rights of petitioner cannot be minimized in this case. The State

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[2] See State v. Smith, 727 S.W.2d 188, 190 (Mo. App. 1987) (parallel rights protected in state and federal jurisdictions). The right of face-to-face confrontation is emphasized in such cases. Coy v. Iowa, 487 U.S. 1012, 1015 (1988). A defendant's right to be present at a deposition is also indicated, for example, in United States v. Keithan, 751 F.2d 9, 12 (1st Cir. 1984).

can plausibly assert that the deposition would probably have gone off as it did even if petitioner had been present, but that is surely unknowable, and contrary to the psychological theory behind the Confrontation Clause. It is supposed that a witness has more difficulty fabricating testimony under oath when the victim of the fabrication sits before him. Even if a perjurer manages to bluff his way through the testimony, it may be supposed that the struggle will be greater if the defendant is present, and that a trier of fact may more readily perceive that the witness is lying.

The major difficulty for petitioner in asserting the claim at this time is, however, that it has not been exhausted before the Missouri courts, and has, therefore, ,been waived as procedural error under state law. Trial counsel himself consented to the deposition and did not object to the testimony. The matter was not pursued on direct appeal by different appellate counsel (Resp. Exh. C)[3] but was necessarily an agenda item in postconviction proceedings, with different counsel, under Rule 29.15. No record was made during petitioner's testimony at the hearing that he had not been given an opportunity to be present during the Gross deposition. Trial counsel, Ossman, was not called by Ms. Hall, counsel at the 29.15 hearing. He testified only when called by the

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[3] This was doubtless not fatal, because ineffective assistance of counsel claims are properly presented, under Missouri practice, in postconviction proceedings under Rule 29.15, Missouri Civil Rules.

State.[4] Post-Trial Transcript, p. 285 (hereinafter PTT).

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[4] In federal habeas proceedings, current counsel has made a record, by taking the Ossman deposition, of certain deficiencies in his competence as counsel in a criminal trial, despite considerable experience. For example, he apparently is unfamiliar with the Batson case (though not necessarily the Batson principles), and disclaims knowledge of a need to make an offer of proof to preserve the record on rejected testimony. This is surprising, given the Supreme Court's ruling in the first appeal of petitioner that the admissibility of the Lee testimony was not preserved as an issue, absent an offer of proof. Ossman does dispute petitioner's testimony about his drinking during the trial, but concedes that he has had a problem with alcohol (this issue was somewhat damaged by petitioner's endorsement of any drinking that occurred, on the supposition that Ossman's representation would become more feisty).

It is my view that Ms. Hall's failure to flesh out these issues precludes making a new and improved record in federal habeas. But see Hadley v. Caspari, 36 F.3d 51 (8th Cir. 1994), where it seems to be at least the law of the case that preservation of "points" authorizes a federal evidentiary hearing, presumably after federal discovery. In any event, my major problem with various ineffective assistance issues here, apart from those highlighted in the opinion, is that there is still an insufficient showing of prejudice tied to the alleged deficiencies to shake my confidence in the original trial outcome. Meis v. Wyoming Dept. of Corrections, 9 F.3d 695, 697-8 (8th Cir. 1993). I do not suggest by this that I would probably have elected the death penalty, given

The Confrontation Clause issue was neither presented to nor decided by the Missouri Supreme Court. Clemmons v. State, 785 S.W.2d 524 (Mo. en banc 1990).[5]

A Confrontation Clause evidentiary record was first made in the petitioner's testimony in federal habeas corpus. Habeas Transcript, pp. 116, 121, 144 (hereinafter HT). It also appears in the First Amended Petitioner in this court, ,at page 6. It seems to have been first dealt with by the Circuit Judge, in his 29.15 findings and conclusions, where he stated (contrary to the record) that the Gross deposition was taken "with the consent of the Movant." Resp. Exh. G, p. 235.[6] Robertson, appellate counsel in the 29.15 proceeding, did not develop a Confrontation Clause issue in his brief. Rsp. Exh. H. After filing of counsel's brief, petitioner filed a

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my overview of all available material. That choice is not mine.

[5] Some fourteen varieties of claimed ineffectiveness were discussed by the Missouri Supreme Court; I have no serious problem with its rulings on those points.

[6] This dispositive finding does not seem to have been challenged by petitioner or counsel prior to the proceeding in this court. The Circuit Judge's finding on February 21, 1989, may have been a response to a pro se second amended motion, mailed January 14, ,1989, but apparently not filed. Pet. Exh. U, p. 60. See also the pro se "Second Addendum to Rule 27.26," filed January 23, 1989, where a confrontation claim against use of the deposition is also asserted. Resp. Exh. G, p. 155.

pro se motion seeking leave to file a supplemental brief, contending that 130 additional points should be raised on appeal. Pet. Exh. HH. It is not clear what these points included. Leave to file the brief was, however, denied on January 24, 1990. Pet. Exh. II.

While it is not clear from the record in this case, and in fact seems unlikely, that a Confrontation Clause issue was fairly presented to the Missouri appellate courts, it is clear that there was a procedural rejection of any such claim at the appellate level. Pet. Exh. II. It is therefore necessarily ruled that there is now a procedural bar to consideration of that claim. Petitioner "has adduced nothing to show that any [state appellate] court actually reached the merits of the federal claim." Ylst v. Nunnemaker, 501 U.S. 797, 806 (1991).

Petitioner argues that he is entitled to rely upon the failure of the Missouri courts to clearly and expressly state that their rulings rest on a state procedural bar, and that such ambiguity precludes the State from asserting a procedural bar. Harris v. Reed, 489 U.S. 255, 263 (1989). The Eighth Circuit has recently concluded, however, that "the Supreme Court clarified the Harris presumption in Coleman v. Thompson, 501 U.S. 722 (1990). Only where there are reasons to fairly conclude that federal claims were ruled or were interwoven with claims that had been ruled, and where there was no clear and express reliance on state grounds, then the presumption applies." Jolly v. Gammon, 28 F.3d 51, 53 (8th Cir. 1994).

It is also established at this time that summary rejection by the Missouri Supreme Court of efforts to

obtain habeas corpus under Rule 91, Missouri Civil Rules, or by motions to recall the mandate, cannot serve to revive substantive claims previously lost by procedural defaults. Byrd v. Delo, 942 F.2d 1226, 1231-2 (8th Cir. 1990) (dealing with rejection of Rule 91 petition which does raise the federal claim). See also Sloan v. Delo, 1995 U.S. App. LEXIS 10721, No. 94-2122 (8th Cir. May 15, 1995), slip op. 15 declining to delay proceedings for further efforts to exhaust claims in state court, ,because "further litigation in the state courts would be futile," in light of the procedural hostility of the Missouri courts toward entertaining untimely claims.

Avoidance of a procedural bar by claiming cause cannot be asserted, where it was a series of attorneys representing petitioner who failed to assert Confrontation Clause claims regarding the taking and use of the Gross deposition. These included counsel in postconviction proceedings, whose deficiencies cannot be asserted as constitutional violations or as cause for procedural defaults. Coleman v. Thompson, 501 U.S. 722 (1991); LaRette v. Delo, 44 F.3d 681, 687-8 (8th Cir. 1995).

The closest petitioner comes to avoiding a procedural bar is in his "motion to recall mandate in 29.15 postconviction appeal" (Pet. Exh. R), where he complains that postconviction appellate counsel, Robertson, abandoned all but six of the issues raised in Circuit Court (Pet. Exh. S), and asks the Missouri Supreme Court to recall the mandate in order to consider all claims made by his attorney in Circuit Court, in her proposed findings and conclusions submitted on February 16, 1989 (Resp. Exh. G, pp. 164-224). It is quite possible that the Supreme Court gave at least cursory

reconsideration to the merits of the claims so advanced by counsel.[7] Motions to recall the mandate are said to permit consideration of claims of ineffective assistance of appellate counsel, but not more wide-ranging claims. Hall v. Delo, 41 F.3d 1248 (8th Cir. 1994). It is not clear that claims of ineffective assistance of counsel that do not have constitutional status are included in such review. Petitioner relied on Strickland v. Washington, 466 U.S. 668 (1984), and did not take into account Coleman v. Thompson, which precludes a Strickland challenge to the conduct of postconviction counsel.

It is also possible, however, that the Missouri Court would not apply the Coleman limitation to cases in which it has found ineffective assistance of postconviction appellate counsel which has adversely impacted on the very decision which is sought to be recalled. As a matter of state procedural law, the Coleman limitation may not be persuasive in this context.[8] Therefore, I shall assume arguendo that the Missouri Supreme Court may have summarily considered whether failing to present on appeal all of the contentions made by counsel in Circuit Court sufficiently

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[7] The formal opinion went beyond the points briefed on appeal and gave "full review" to the pro se 29.15 motion and counsel's amended motion. 785 S.W.2d 534, 527.

[8] But see Reuscher v. State, 887 S.W.2d 588 (Mo. en banc 1994), suggesting reasons for using the recall of mandate procedure which would apply only to the original appeal, not the 29.15 appeal.

demonstrates ineffective assistance on appeal as to merit recalling the mandate.

For several reasons, however, this assumption does not help petitioner. First, I am satisfied that selectivity by Robertson, appellate counsel, even over the protest of a party, is not in itself ineffective assistance. It is selectivity per se to which petitioner vigorously objected. Moreover, the Confrontation Clause issue, challenging the taking and use of the Gross deposition without petitioner's presence, was not an issue presented by counsel at the Circuit Court level. And the Circuit Court ruling, that petitioner had consented to the procedure (Resp. Exh. G, p. 235), stood unchallenged by him as well as counsel. Therefore, giving petitioner the benefit of the doubt, the point was neither made nor preserved before the Missouri Supreme Court in the motion to recall the mandate.

Plaintiff thus seems to have previously made at least a fitful reference to a Confrontation Clause violation, but his conduct in cluttering the record with claims seems to have successfully buried the point. He doubtless cannot be personally faulted because unskilled in the law, but the only lawyer who has taken the point seriously is current counsel, and under existing procedural law he is too late.[9]

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[9] A subsidiary issue relating to Gross is whether he was with petitioner on the morning on which he has a belated memory of an admission by petitioner. Direct records are no longer available, and in any event I do not consider it materially impeaching if petitioner could

(2) Failure to Call Dwight Clark

The State's theory of the trial testimony regarding the stabbing death of Henry Johnson was that the prison inmate witnesses, called by defendant, were testifying in accordance with "the inmate's law," under which "you don't tell. You don't snitch." TT 504. Fred Bagby, who was "conveniently deceased" (TT 500) at the time of the trial, was therefore a safe target for their testimony. The killing was allegedly an assassination by petitioner, acting alone "or with the help of others." TT 522.

The trial judge found the inmate testimony incredible. Resp. Exh. G p. 247.

At the hearing in this court, petitioner described the stabbing as occurring in a group of three inmates: Johnson, Bagby and a hooded man he chose not to identify. HT 190. Identifying the killer or his companion at the time of the homicide was said to have been precluded by "penitentiary etiquette." HT 189. Petitioner said his involvement was only as a bystander, with another group of inmates. He testified, however that the stricken Johnson ran into him or grabbed him as shield, whereupon petitioner did swing at Johnson, possibly hitting him twice. HT 187, 195.

At the 29.15 hearing, petitioner testified that he had recently learned of an inter-office communication

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establish that Gross was not with him on a particular day or morning. Surely it would be the admission itself (if made) that was memorable 19 months after the event.

dated on the day of the killing and admitted into evidence at the hearing as Movant's Exhibit 2 (PTT 118), naming Fred Bagby as Johnson's assailant. A copy is attached to this opinion as an appendix. It also appears as Exh. Z, movant's exhibits here (filed with the traverse). According to Dwight Clark, an inmate who apparently did not feel himself bound by "penitentiary etiquette," he was an eyewitness to the event, unknown to petitioner. Clark told his interviewer that "he had witnessed the assault (sic) on Johnson, and that he had seen two (2) men stabbing Johnson. He described both assailants as being black, and he thought one was inmate Fred Bagby but only knew the second inmate by sight." A copy of the memorandum purportedly was filed in the victim's prison file, but has not been found there. It is petitioner's theory that the document was either suppressed by the State, in violation of Brady v. Maryland, 373 U.S. 83 (1963), or was misplaced after having been available but neglected by petitioner's trial counsel, thereby raising an issue of ineffective assistance of counsel. Another possibility would be that it was taken by an inmate and floated in the prison population until given to petitioner after trial.

There is little need to resolve the choices which necessarily turn on guessing long after the event. Trial counsel Ossman had no recollection of reviewing the memorandum. If taken from the victim's file by the State intentionally or negligently under the broad reading of the Brady rule in Kyles v. Whitley, 115 S.Ct. 1555 (1995), I am satisfied that, absent procedural default or waiver by petitioner, the belated discovery of the memorandum would justify a new trial. Similarly, if the memorandum was in the victim's file, but was not

examined or was discounted by Ossman, I am satisfied that neglect of a document of such significance would deprive petitioner of the level of representation mandated by the Constitution, absent procedural default or waiver.[10]

There are two weaknesses in the memorandum, from petitioner's standpoint: (1) Captain Gross, the author, concluded that "Clark did not make sense," and (2) Clark did not expressly exonerate petitioner as hypothetically the "second inmate" involved in the stabbing. Clark's testimony before me overrides both these reservations. Clark may have a rather quirky personality, but he does largely "make sense." His credibility was rather high, given the delay between the event and the hearing in June, 1994. He seems individualistic and candid, not subject to "prison etiquette." He identified Fred Bagby, some months before Bagby's death, as one of the guilty persons. He exonerated petitioner, in the sense that he knew he was not the hooded inmate with Bagby, and that he identified petitioner as being in a separate group at the time he observed the stabbing.

It is difficult to avoid the conclusion that Clark would have been petitioner's best possible witness, during the guilt phase of his trial. It seems probable that

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[10] It is of course possible that it was quickly removed by a friend of Bagby, but that is speculative. It will be presumed that the State is in control of its own records. The only remedy for that sort of newly-discovered evidence would probably be State habeas corpus.

counsel was grossly ineffective in not pursuing the lead that was supposedly contained in the victim's file, or there was a Brady violation of critical importance to the defense. I cannot now rely on the Clark testimony, however, to find entitlement to a new trial, because petitioner personally elected flatly against calling Clark at his 29.15 hearing. Counsel for the State obtained an admission from petitioner that he had subpoenaed Clark to testify, and he acknowledged that he "chose not to call him." PTT 128. This is fatal to the claim at this time.

Judge Anderson's findings and conclusions do not deal with the missing memorandum or the possibility of using Clark as a witness. Apparently he treated the issue as having been abandoned.[11] Although subsequently mentioned by petitioner and his counsel in the lengthy list of grounds for a new trial, it seems clear that petitioner had his opportunity to establish that Clark had favorable testimony and rejected the opportunity. Petitioner cannot bury the issue and then resurrect it; that would be an abuse of the judicial process.

While not necessary to decision, I can imagine a likely reasons for abandoning the Clark testimony at the 29.15 hearing.[12] One possibility is that petitioner is more

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[11] The Missouri Supreme Court also tacitly understood there was no surviving Brady issue or an ineffective assistance issue relating to Dwight Clark. 785 S.W.2d 524.

[12] Petitioner could not explain this in the 1994 hearing. HT 187.

skeptical than I am about Clark's credibility, or the effect of a somewhat eccentric witness on his case. Another possibility is that he was fearful of one aspect of the Clark testimony--Clark saw no blood immediately after what he referred to as "a fight," but only later, when the victim ran "for the control center." HT 66. Clark "saw blood after we got to that point." HT 66. "I know when I got to the control center I saw some blood, because he was begging the guard to open the door, to let him in." HT 67. This was apparently after Johnson's encounter with petitioner, when petitioner acknowledges striking Johnson, possibly twice. HT 195. The possibility thus exists, using the Clark testimony, that it was the encounter with petitioner, not the earlier one with Bagby, in which Johnson was fatally stabbed. It must be said that petitioner's testimony about his encounter with the victim has some peculiar aspects.[13]

Because petitioner chose not to call Clark as a witness at the 29.15 hearing, after having the same knowledge of the circumstances as he has today, he failed to establish prejudice when he had the opportunity to do so, and is procedurally barred from seeking a new trial because of the prospective testimony of Dwight Clark.

(3) Exclusion of Lee's Testimony about

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[13] On the other hand the inability to locate a knife, even though petitioner was almost continuously watched by Officer Steigerwald, is a point in his favor. In any event this is clearly not reviewable as a colorable "actual innocence" case.

Johnson's Homosexual Harassment of Petitioner

Petitioner contends, ,with some plausibility, that he was distinctly prejudiced during the penalty stage of the case by the court's exclusion of evidence from Robert E. Lee that petitioner had complained to him about Johnson's homosexual conduct. There was evidence that there was some trouble between Johnson and petitioner that caused them to be separated from celling together. There was also testimony by petitioner that they had a fight because Johnson was insistent about a homosexual relationship. TT 556. As some verification of petitioner's testimony, to show that it was not concocted after Johnson's death to gain sympathy for petitioner, he proposed to call Robert E. Lee, a retired teacher at the penitentiary, to testify about petitioner's complaints concerning sexual harassment. TT 551. Objections were sustained to testimony about complaints as being hearsay. TT 551. The witness was apparently eager to testify on petitioner's behalf. TT 553.[14] On the initial appeal the Missouri Supreme Court rejected the claim of error because (1) there had been no offer of proof and (2) the petitioner had himself testified about homosexual pressure by Johnson. Thus, there was "no plain error." State v. Clemmons, 753 S.W.2d 901, 909 (Mo. en banc. 1988).

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[14] See Lee's deposition of January 12, 1988, Exhibit A to First Amended Petition for Writ of Habeas Corpus (Doc. 18), which incidentally asserts an interesting layman's view that there should have been no defense presented at the guilt phase. Dep. 16.

In the 29.15 proceeding, petitioner urged ineffective assistance of counsel for failing to make an offer of proof. Judge Anderson rejected the claim on the theory that hearsay evidence was subject to a sound objection, and that an offer of proof would have been futile. Resp. Exh. G p. 247. On appeal, there were references in briefs to Lee's "aborted testimony" and "excluded testimony" (Resp. Exh. H pp. 22, 23), but no development of the issue. Further consideration is likely barred be deficiencies of postconviction counsel on appeal. Moreover, it may be safely concluded that any claim of an erroneous hearsay ruling would not rise to the level of a constitutional violation.

It is my view that Lee's testimony would have been important at the penalty stage, might well have been decisive if petitioner had no prior homicide conviction (discussed below) and would have been admissible under Federal evidentiary standards. Under Federal Evidence Rule 801(d)(1), what petitioner said to Lee before the Johnson stabbing would seem to be "consistent with the declarant's testimony" and would be "offered to rebut an express or implied charge against the declarant of recent fabrication . . . ." Hearsay theory regarding the treatment of prior consistent statements is, however, a long-debated issue, subject to close calls at the trial level. Tome v. United States, 115 S.Ct. 696 (1995). Even if a mistaken evidentiary ruling occurred, it was hardly so "'gross,' Conspicuously prejudicial,' . . . or otherwise of such magnitude that it fatally infected the trial'" and thus violated petitioner's due process rights. Snell v. Lockhart, 14 F.3d 1289, 1299 (8th Cir. 1994).

(4) Continued Prematurity of Claim that Death Penalty was Grossly Disproportionate to the Offense

Any reasonable observer of the trial record is likely to conclude that the death penalty was imposed by the jury because the jury viewed petitioner as a recidivist killer, undeterred by a previous life sentence without parole for fifty years.[15] On the current record (including the most recent hearing in this court) one must conclude that a reasonable fact-finder could, and did so classify petitioner.

This conclusion has several implications. It makes somewhat extraneous the insistent complaint that trial counsel greatly prejudiced petitioner by failing to develop more evidence of his "good side." Petitioner and his mother were the basic witnesses; he says much more should and could have been shown. Petitioner could have been shown to have been generally studious, with a creditable prison adjustment, and has friends and relatives on the outside who can vouch for his general good conduct.

Courts are all too familiar with Jekyll and Hyde offenders. What petitioner urges as fatal neglect by trial counsel may be compared with failure to collect a flood of letters from admirers which are generally treated by a

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[15] See Exh. D. Galliher Attachment p. 4, Exhibits in Support of Amended Claim 8, submitted May 4, 1995. See also proportionality discussion in State v. Clemmons 753 S.W.2d 901 (Mo. en banc 1988).

sentencing judge as worthless clutter when a really serious offense has occurred.

When this case was submitted to the jury, argument for the State found it unnecessary to deal with petitioner's humane and conventional side. On the contrary, counsel for the State simply argued that a fifty year sentence "wasn't enough, and that man killed again." TT 572-3. He argued that a life sentence would be "useless, absolutely useless. As a practical matter he will not get out of prison anyway." TT 573. "If you can't live outside these walls without killing, if you can't live inside those walls without killing, I think we put him on death row to make sure he doesn't kill again." Tr. 574. On rebuttal, counsel argued that petitioner "did not give Todd Weems' mother an opportunity to plead for mercy for her son and he sure . . . . did not give Henry Johnson's mother an opportunity to plead for her son's life." TT 577. "Should you decide to sentence Eric Clemmons to life in prison . . . . I'm going to send him back to where he can kill again whenever it's convenient and he feels the desire to do so." TT 578. "I ask you to take those actions necessary to reduce that man's opportunity to kill to the absolute minimum. That can only be done by a sentence of death." TT 578.

While trial counsel for petitioner hardly did commendable work in representing petitioner, it is most unlikely anything could have been done to meet the State's simple and appeals argument.[16] If, however,

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[16] Petitioner has urged that he should have had an opportunity to develop his contentions about the first

petitioner had been a first offender, ,in a homicide sense, a show of statistics is probably unnecessary to demonstrate that he would have had an excellent chance of escaping the death penalty, particularly if given the opportunity to show sexual harassment and an extortion attempt by Johnson, and perhaps more evidence that the victim was a "bad actor." But I am reasonably satisfied that further development of petitioner's generally good character and of the victim's generally bad character could not have saved petitioner from the death penalty verdict, ,given the prior homicide conviction and the insufficient deterrence of the pre-existing sentence.[17]

Petitioner has filed a companion case under 28 U.S.C. §2254 in the Eastern District of Missouri, Clemmons v. Delo, Cause No. 90-2418C(1), seeking relief from his conviction for the Weems homicide in

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conviction, for the killing of Todd Weems, but it is quite unlikely the trial judge would have permitted relitigation of the Weems case or that a contention could have successfully been made that the Weems case jury was mistaken. There could have been a confusing debate as to whether petitioner struck the fatal blows or simply participate by beating the victim with a pipe. 785 S.W.2d at 528. As noted, however, there is a pending habeas corpus case in the Eastern District of Missouri in which the constitutional soundness of the earlier proceeding is still in issue.

[17] "Bad character" evidence would, of course, subject petitioner to backlash for implying that Johnson "deserved to die."

1983. I have been supplied with an adverse report and recommendation filed by Magistrate Judge Adelman in 1993, but I now understand there has been a change of counsel and a recently amended petition. I previously denied petitioner's motion for stay of these proceedings to await the outcome of the Weems litigation. As indicated in a recent memorandum to counsel in this case (Doc. 81) although I rejected a stay, I believe concurrent processing of the two cases is desirable. I further expressed the view that "there could be no justifiable execution in this case" before a ruling on the prior case, ,"with opportunity for appellate review concurrently with the review of my ruling, ,even if adverse to petitioner." I also suggested that executive clemency would surely be more compelling if it should develop that "this was petitioner's first homicide."

Until the 1983 conviction has been overturned, however, there seems little prospect for judicial or other relief from the penalty imposed at trial. Relief cannot be given at this time, on the present record, assuming the validity of the capital murder conviction relating to Todd Weems.

(5) Conversing the Death Sentence Qualification of Jurors

Any slim hope of avoiding the death penalty, once the jury had found guilt, would have rested upon jury selection which not only excluded absolute opponents of the death penalty but also hardened proponents of that penalty in the event of a capital murder conviction. I certainly agree, therefore, with the experts offered by petitioner at the 29.15 hearing that good defensive

practice on voir dire would include a question to determine if the members of the panel would automatically favor the death penalty upon a finding of guilt. Failure to ask such questions seems to have been raised as an issue arguably violating due process rights in at least one case. Baldwin v. Jones, 1995 U.S. Dist. LEXIS 6100, No. 91-0390-RV-M (S.D. Ala. 1995). That challenge failed under the procedural bar theory, *219.

Even if I were to conclude that failure to voir dire the jury in this manner bordered on malpractice, I nevertheless accept the theory of the Missouri Supreme Court that prejudice has not been demonstrated (785 S.W.2d at 529)[18] or, in the alternative, consider the deficiency sufficiently novel as a constitutional issue that I conclude that it does not rise to the level of a Strickland violation. See Teague v. Lane, 489 U.S. 288 (1989). Some years after the trial in question, the Supreme Court decided that a trial judge must, upon request, ask the type of question here presented. Morgan v. Illinois, 112 S.Ct. 2222 (1992).

(6) Additional Analysis

As earlier noted, further searching through the haystack of issues to find a needle that might bring down the State's case, as a matter of constitutional law, does not seem feasible, given the need to issue an opinion in this overly-protracted litigation. If a significant issue

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[18] Compare, Clark v. Collins, 19 F.3d 959, 965 (5th Cir. 1994) (prejudice not established even though racial bias question should presumably have been asked).

favorable to the defense has been overlooked, skillful counsel for petitioner will have an opportunity to focus attention on such point or points in a motion to reconsider or on appeal. As further clarification, I repeat that I do not quarrel with issues ruled by the Missouri Supreme Court. Issues not expressly dealt with here or there, largely barred by abandonment on appeal[19] by postconviction counsel (except as saved by the pro se motion to recall the mandate), are in any event not in my judgment worthy of express consideration.[20] I further

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[19] The only instructional error ruled in the initial appeal (soundly, in my judgment) related to multiplicity of aggravating grounds. 753 S.W.2d 15 911-12. Another instructional complaint in the 29.15 case was deemed untimely. 785 S.W.2d at 531. It is surely too late now to object to additional instructions, either directly or in the guise of ineffectiveness claims, not previously presented and ruled.

[20] Although counsel for the petitioner urges the court to consider the "cumulative effect of trial counsel's errors and omissions," see Petitioner's Post-Hearing Brief at 6, the Eighth Circuit has rejected claims of cumulative error, stating that "each habeas claim must stand or fall on its own . . . ." Girtman v. Lockhart, 942 F.2d 468, 474-75 (8th Cir. 1991). In my view, to the extent any of petitioner's unmentioned claims might survive procedural bar analysis, none of petitioner's claim sis sufficient, on its own, to warrant habeas corpus relief under the standard set forth in Strickland, 466 U.S. 687-96. I don ote that Judge Eisele has urged the Circuit to "reexamine its position on cumulative error." Wainwright v. Norris,

conclude that the State's Response (Doc. 28) is generally

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872 F.Supp. 574, 620 (E.D. Ark. 1994). He wrote in the context of a case in which he felt that "it is very probable that the outcome of the penalty phase of this trial would have been different" if none of the "prejudicial errors or circumstances had occurred . . . ." 872 F.Supp. at 620. That is not my view in this case; as indicated, my confidence in the outcome of the guilt or penalty phases of the trial would be shaken only if the petitioner's first homicide conviction were invalidated.

Among the points which are to some extent challenging are (1) counsel's failure to inquire further before dropping Alvin Kirksey-Bey as a trial witness and (2) counsel's failure to locate, interview and use an inmate clerk-typist, John William Brown, who might have called into question an alleged doubtful comment about the report of Henry Johnson's murder. The Kirksey-Bey claim and the Brown claim were raised in the 29.15 proceedings, see Respondent's Exhibit G at 12, 70; however, the Circuit Court concluded that the testimony regarding those issues was not credible. Respondent's Exhibit G at 227, 239. Counsel did not challenge the Circuit Court's credibility determinations on appeal from the 29.15 ruling. See Respondent's Exhibit H. Moreover, the credibility questions were not fairly raised by petitioner's pro se motion to recall the mandate, which raised additional issues outside of counsel's brief. See Exhibit N to Petitioner's Traverse. In any event, the Kirksey-Bey and John Brown issues are factually complicated and do not appear to be clearly supportive and significant as defensive material at the guilt phase of trial.

sound.

Missouri practice relating to a motion to recall for ineffective assistance of appellate counsel (if construed to include postconviction appellate counsel) requires that "strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it." Reuscher v. State, 887 S.W.2d 588, 591 (Mo. en banc 1994). The sort of blanket reference to omitted issues attempted by petitioner would apparently not, under Missouri practice, require point-by-point analysis by the Missouri appellate courts. It is entirely unlikely that anything except the most"obvious" was realistically considered before denial of the motion to recall the mandate.[21]

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[21] I am again giving petitioner the benefit of the doubt as to Reuscher's application to postconviction appellate counsel, which I do not find to have been ruled as matter of Missouri practice. It seems probable that any procedural lenience will be confined to gap otherwise existing in the Missouri rules relating to the initial appeal. 887 S.W.2d at 591. The Missouri Court is not habitually generous in these procedural matters, except when grave injustice would otherwise occur by reason of a hole in the procedural rules. These require consideration of motions to recall mandates on the first appeal, and in some circumstances the use of state habeas authority.

The amended petition for a writ of habeas corpus under 28 U.S.C. §2254 is therefore DENIED.

The stay of execution shall CONTINUE, if appeal is timely filed, until a final adverse ruling on appeal. SO ORDERED.

Dated: July 7, 1995

-- Signature of Judge --
HOWARD F. SACHS
SENIOR DISTRICT JUDGE

SUPREME COURT OF MISSOURI
EN BANC

ERIC D. CLEMMONS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 71535
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY
Honorable David P. Anderson, Judge

Eric Clemmons was convicted by a jury of murder in the first degree in the slaying of a fellow penitentiary inmate; the jury assessed his punishment at death. The trial court entered judgment accordingly; this Court affirmed the judgment on direct appeal. ***State v. Clemmons,*** 753 S.W.2d 901 (Mo. banc 1988). Clemmons now appeals from the judgment in denial of his motion to vacate judgment and sentence pursuant to Rule 29.15. Affirmed.

At the outset of this review, the circumstances of this case require a construction and direction to bench and bar with respect to Rule 29.15(f):

> Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the

> entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days.

Clemmons moved, ***pro se,*** for relief under Rule 29.15 June 27, 1988. The trial court appointed trial counsel for movant June 28, 1988. On August 1, 1988, 34 days after her appointment, counsel requested a 30 day extension of time to file an amended motion. On the same date the trial court extended the time 26 days to August 27, 1988. (August 27, 1988, was a Saturday and the amended motion was filed within the extended time, August 29, 1988. Rule 44.01(a).)

The trial court accorded an evidentiary hearing on all points presented by the ***pro se*** and first amended motions; and on February 21, 1989, entered findings of fact and conclusions of law in denial of all such points and allegations.

Arguably, the points presented by the first amended motion were time-barred under the first sentence of Rule 29.15(f) because of the failure to file the amended motion within 30 days of counsel's appointment.

It is at least equally arguable that the first amended motion was timely filed because of the extension granted under the authority given the trial court in the second sentence of Rule 29.15(f).

Because of this ambiguity in Rule 29.15(f) and its application in this case, this Court resolves the resulting

dilemma in favor of full review of all points presented by the ***pro se*** and first amended motions.

Hereafter, until it may be appropriately amended, Rule 29.15(f) shall be construed and applied as a bar to any amended motion not filed within thirty days of the date counsel is appointed or counsel that is not appointed enters an appearance; and further, the discretion of the trial court to extend the time for one additional period not to exceed thirty days shall be limited to an exercise of that discretion within the thirty day period first above mentioned and limited. The foregoing construction and application shall apply to all motions for post conviction relief affected by Rule 29.15(f) from and after the publication date of this opinion in West's South Western Reporter series.

Appellate review of a denial of post-conviction relief is limited to whether the findings, conclusions and judgment of the motion court are clearly erroneous. Rule 29.15(j). The motion court's findings, conclusions and judgment are clearly erroneous only if a review of the entire record leaves the court with a definite and firm impression that a mistake has been made. ***Day v. State***, 770 S.W.2d 692, 695-96 (Mo. banc 1989).

Ineffective Assistance of Counsel

Clemmons presents numerous allegations of ineffective assistance of trial counsel. The performance of trial counsel is governed by ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show counsel's performance was deficient in that it falls below an objective standard

of reasonableness. ***Id.*** at 687-88. Second, the defendant "must show that the deficient performance prejudiced the defense," ***Id.***, and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

Counsel's presentation of the penalty phase of a criminal trial is a matter for professional judgment. ***Preston v. State,*** 736 S.W.2d 53, 55 (Mo. App. 1987), ***cert. denied,*** 484 U.S. 1020 (1988). Whether counsel's judgment is good or bad is measured not by the sentence defendant receives, but by whether counsel's advocacy on defendant's behalf was reasonable under the circumstances. ***Id.***

Clemmons charges counsel failed to present mitigating evidence from his stepfather; other family members; his prison work supervisor, Archie Opie; an unidentified correctional officer; and Ruth Fridley, a public speaking teacher. The motion court determined that he named only his mother and stepfather as potential character witnesses for the trial and the punishment phases, and that trial counsel made a reasonable decision not to call defendant's stepfather because of his speech impediment. The motion court also found Clemmons's testimony lacked credibility and rejected it, choosing to believe trial counsel's testimony, thus an issue of credibility resolved by the motion court. ***See Richardson v. State,*** 719 S.W.2d 912, 915 (Mo. App. 1986).

Counsel has no absolute duty to present mitigating character evidence at the penalty phase of a trial, ***Jones***

v. State, 767 S.W.2d 41, 43 (Mo. banc 1989), *cert. denied*, 110 S.Ct. 207 (1989); counsel has "a duty to make a reasonable investigation of possible mitigating evidence or to make a reasonable decision that such an investigation is unnecessary, *Id.* In particular, the reasonableness of counsel's decisions depends upon the strategic choices and information provided by defendant. *Id.*

Clemmons's mother testified during the punishment phase as to his "good character." Thus, the additional character evidence would have been cumulative. Counsel, having presented the testimony of his mother, was under no absolute duty to present additional mitigating evidence. He used sound trial strategy in choosing not to call Clemmons's stepfather. In these circumstances, Clemmons was not prejudiced by the decision not to call the additional witnesses.

Clemmons charges counsel did not seek a psychological evaluation. He does not allege anything that would have alerted counsel to need of a mental evaluation, or that anything significant would have been found during a mental evaluation. The judge who presided at both trial and evidentiary hearing determined Clemmons was competent and that his testimony at the trial and hearing demonstrated he was articulate and aware of the nature of the proceedings and details of the case. The motion court further found Clemmons was able to participate in the preparation of his defense, provide information to his lawyer and participate in decisions. Because Clemmons does not allege or demonstrate how he was prejudiced by the failure of trial

counsel to obtain a mental evaluation, trial counsel cannot be deemed "incompetent" under ***Strickland.***

Clemmons charges counsel failed to present evidence of the victim's vile character and reputation for homosexual harassment and extortion. The motion court determined that this evidence was presented by Clemmons, himself.

Clemmons charges counsel failed to contest his role in the first murder for which he was imprisoned in the penitentiary at the time he committed the present murder. He asserts his trial counsel should have argued that his brother inflicted the fatal blows in the first murder because ***State v. Barnes,*** 708 S.W.2d 270 (Mo. App. 1986), indicates Clemmons's brother, Stanley Barnes, inflicted the fatal blows upon the victim, Todd Weems.

Barnes states that while Clemmons beat Weems with a pipe, lethal blows came from his brother. ***Id.*** at 272-73. Clemmons, however, ignores that he was charged with acting with another in the commission of the offense. ***State v. Clemmons,*** 682 S.W.2d 843, 845 (Mo. App. 1984). In Clemmons's direct appeal, the court determined he inflicted the fatal blows with the pipe. ***Id.*** Whether Clemmons or his brother was the direct cause of Weems's death is of no consequence under the charge and submission. Any argument by Clemmons's trial counsel that he did not cause Weems's death ignores that he was responsible for the murder and properly convicted. Trial counsel cannot be deemed ineffective for declining to make a non-meritorious argument.

Clemmons charges counsel failed to rehabilitate eight jurors who were stricken because of expressed opposition to the death penalty. Trial counsel agreed with the trial judge's ruling that each of the eight potential venirepersons had stated unequivocally their opposition to the death penalty. The motion court determined that further effort to rehabilitate these members of the panel appeared unlikely to succeed.

The standard for determining whether a venireperson may be removed for cause during death penalty qualification is whether the venire person's views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" ***State v. Sloan,*** 756 S.W.2d 503, 505 (Mo. banc 1988), ***cert. denied,*** 109 S.CT. 1174 (1989), ***citing Wainright v. Witt,*** 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed. 2d 841, 851-52 (1985). This determination is not based on a single response but rather on the entire voir dire examination and lies within the trial court's discretion. Absent an abuse of that discretion, the trial court's ruling will not be overturned on appeal. ***Id.*** at 506.

The United States Constitution does not prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, prospective jurors whose opposition to the death penalty is such that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial. ***Lockhart v. McCree,*** 476 U.S. 162, 165, 106 S.Ct. 1758, 1760, 90 L.Ed. 2d 137 (1986). ***See State v. Guinan,*** 732 S.W.2d 174, 176 (Mo. banc 1987), ***cert. denied,*** 108 S.Ct. 308 (1987). The trial court did not abuse its

discretion in sustaining the State's challenges for cause to those venirepersons who stated that they could not consider the death penalty as a potential punishment. Clemmons complains he was prejudiced because his trial counsel did not attempt to "rehabilitate" prospective jurors, yet he offers no suggestion how these prospective venirepersons could have been rehabilitated.

Clemmons charges counsel failed to identify members of the venire who would automatically impose the death penalty. Clemmons, himself, does not identify these jurors nor does he allege that any such jurors exist.

Clemmons charges counsel failed to object to a question by the prosecutor that sought a commitment from jurors to impose the death penalty. The prosecutor asked whether the venirepersons would be able to consider the death penalty with the additional knowledge that one of them might become the jury foreman and have to sign the verdict. The motion court determined this was a proper follow-up question for several members of the panel who equivocated whether they could impose the death penalty if selected to serve as jurors. The motion court held Clemmons's claim of ineffectiveness during voir dire was without merit because he failed to demonstrate any bias occurred against him because of the jury selection process. The motion court determined correctly this was a proper follow-up question, and accordingly, Clemmons's trial counsel cannot be deemed ineffective for declining to make a non-meritorious objection. ***See Shaw v. State,*** 686 S.W.2d 513 516 (Mo. App. 1985).

Clemmons charges counsel failed to conduct voir dire on the presumption of innocence thus the jury might not have understood this principle. The motion court determined the total voir dire examination and the instructions of the court adequately informed the jury of the burden of proof the presumption of innocence, and all necessary matters of law. Clemmons failed to demonstrate that any bias resulted from the jury selection process. Clemmons's trial counsel questioned the venirepersons whether they thought Clemmons was guilty merely because he was in prison and asked them about their understanding of the burden of proof. The jury received proper instruction on the presumption of innocence.

Clemmons charges counsel failed to raise a ***Batson v. Kentucky,*** 476 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), objection. The record shows that the venireman in question, Bolden was removed by the State because his wife had been arrested and his cousin charged with and apparently acquitted of murder.

A criminal defendant must satisfy both the performance and prejudice tests to prevail on an ineffective assistance of counsel claim. ***O'Neal v. State,*** 766 S.W.2d 91, 92 (Mo. banc 1989). If this Court is able to dispose of this claim on the ground of lack of prejudice, then it is free to do so. ***Id.*** Clemmons fails to show prejudice and to show why a reasonably competent attorney would object under these circumstances. Clemmons does not show that there was any merit to this objection nor allege that the trial jury was not fair and impartial.

Clemmons charges counsel failed to object to a misstatement of the evidence when the prosecutor said Morris Cavanaugh was the only other witness; that Cavanaugh saw a knife; and that there was blood on the testbook. He also faults trial counsel for failure to object to penalty phase argument regarding his prior convictions,[1] and to preserve for review the alleged error in the State's incorrect argument not to consider sympathy. Other than the exception described in footnote 1, these points were raised on direct appeal, ***State v. Clemmons,*** 753 S.W.2d at 908-910, and cannot be re-litigated in this post-conviction proceeding. ***O'Neal,*** 766 S.W.2d at 92 (a claim raised and determined adversely to appellant on direct appeal cannot be re-litigated by attempting to transfer the claim into a claim of ineffective assistance of counsel). Although Clemmons attempts to distinguish these claims because they were reviewed for plain error by this Court on direct appeal, ***Sidebottom v. State,*** 781 S.W.2d 791 (Mo. banc 1989), held that the basis for this Court's finding of no manifest injustice on direct appeal served to establish a finding of no prejudice under the ***Strickland*** test.

Clemmons charges counsel failed to object to the prosecutor's allegedly improper statement regarding Thomas Steigerwald and the meaning of "reasonable

---

[1]Although appellant makes this assertion regarding prior convictions in his Point V, he briefs no explication in the argument portion of the point. As a consequence, no answer or response is required. Rules 30.20 and 84.13.

doubt." The prosecutor drew an inference, stating "that there only has to be one witness, and if you believe that witness, that is proof beyond a reasonable doubt," and went on to argue Steigerwald was that witness and he had no reason to lie. This was not an attempt to define "reasonable doubt." ***Cf. State v. Jones,*** 615 S.W.2d 416 (Mo. banc 1981), and ***State v. Shelby,*** 634 S.W.2d 481 (Mo. 1982). The prosecutor has the right to argue evidence and reasonable inferences from the evidence. ***State v. Clemmons***, 753 S.W.2d at 908. The prosecutor may state a conclusion if that conclusion is fairly drawn from the evidence, ***Grubbs v. State,*** 760 S.W.2d 115, 119 (Mo. banc 1988), ***cert. denied,*** 109 S.Ct. 2111 (1989); and has the right, within the limits of closing argument, to provide the State's view on the credibility of witnesses. ***State v. Bryant,*** 741 S.W.2d 797 799 (Mo. App. 1987).

Clemmons charges counsel allowed the prosecutor to "badger" a defense witness. Subject questions were put to a hostile inmate witness who refused to answer questions; they went to the witness's prior convictions. The motion court noted that Clemmons did not offer any basis for an objection. Clemmons does not explain the theory upon which counsel could have objected nor does he allege prejudice from this claim.

Clemmons charges counsel failed to request MAI-CR3d 310.06 be given because of a statement he voluntarily made while in custody. After waiving his ***Miranda*** rights Clemmons gave a statement to a prison investigator in which he denied stabbing the victim. Subsequently, while being transferred to a maximum

security cell, he spontaneously remarked to an accompanying officer, "I guess they got me."

Although the Notes On Use for MAI-CR3d 310.06 say it must be given when requested, counsel's decision not to request the instruction was sound trial strategy in this case. The instruction would serve only to direct attention to an obviously voluntary confession.

Clemmons charges counsel failed to request Instruction 308.14 on defendant's right not to testify. The motion court noted that no comment, argument or other matter suggested to the jury that Clemmons's failure to testify could be used against him. The motion court further noted that Clemmons failed to demonstrate that submission of this instruction would have had any beneficial impact upon the result of the proceeding. Clemmons does not show any prejudice from absence of the instruction, nor does he allege there was any improper comment or suggestion regarding Clemmons' election not to testify.

Trial court Error

Clemmons asserts that trial court was clearly erroneous in giving and his trial counsel ineffective for not objecting to Instruction No. 14, MAI-CR3d 313.44, on submission of mitigating circumstances.

Claims of trial error are not cognizable in a Rule 29.15 motion except where fundamental fairness requires otherwise, and then, only in rare and exceptional circumstances. ***Walls v. State,*** 779 S.W.2d 560, 563 (Mo. banc 1989). Movant demonstrates no exceptional

circumstances here. The defense requested this instruction and cannot now attack it as "invalid" and "prejudicial." ***State v. McIlvoy,*** 629 S.W.2d 333, 339 (Mo. banc 1982), and ***State v. Euell,*** 583 S.W.2d 173, 178 (Mo. banc 1979). Although Clemmons asserts his trial counsel was ineffective for not objecting to this instruction, he does not allege his trial counsel was ineffective for submitting the instruction. Further, the instruction meets the tests of ***Mills v. Maryland***, 486 U.S. 367, 108 S.Ct. 1860 100 L.Ed.2d 384 (1988), and ***Skipper v. South Carolina***, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). ***See Roberts v. State*** 775 S.W.2d 92, 96 (Mo. banc 1989).

Motion Court Error

Clemmons asserts the motion court was clearly erroneous in excluding the testimony of four public defenders about their opinions on whether Clemmons received effective assistance of counsel. ***Lewis v. State,*** 623 S.W.2d 562, 563 (Mo. App. 1981), holds that an attorney cannot be called as an expert witness to criticize the actions of another attorney on an issue of competency when the court is equally competent to make that decision. Clemmons made an offer of proof in which the public defenders expressed their opinion that Clemmons's trial counsel was ineffective in various respects. The State's objections to the introduction of the public defenders' testimony were sustained.

Parkus v. State, 781 S.W.2d 545, 548 (Mo. banc 1989), held an attorney's opinion on whether appellant's trial counsel had served ineffectively was properly excluded. The ultimate issue before the motion court

was effectiveness of trial counsel and in reaching that decision, opinion evidence is only pertinent if from one of knowledge or experience, and the court is not competent to make such a judgment. ***Id.*** A motion court is at least as capable as another attorney in reaching a decision based on the evidence presented, and therefore the opinion of an attorney on the same subject is irrelevant and incompetent. ***Id.*** ***See also Sidebottom***, 781 S.W.2d at 791.

The judgment is affirmed, and the attention of bench and bar is directed to the construction and directions with respect to Rule 29.15(f) stated at the outset of this opinion.

--Signature of Judge --

ANDREW JACKSON HIGGINS,
Judge

All concur.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1086WMKC

Eric Clemmons,

Appellant,

vs.

Paul Delo,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 7, 1997

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)
)
Respondent,)
)
vs.)
)
ERIC D. CLEMMONS,)
)
Appellant.)

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Comes now Appellant, Pro Se, in this motion and states all as follows in support thereof:

1. There is presently pending an appeal in appellant's behalf before this court. File on or about December 7, 1989, by counsel of record Henry B. Robertson.

2. Appellant's attorney of record has failed to raise all grounds that he is required to in the brief filed by him in appellant's behalf.

3. The brief filed by appellant's attorney of record raises only (6) points. Appellant's case is replete with trial errors prejudicial to Appellant which may be deemed abandoned unless raised on appeal here.

4. Several months before the brief was due in this cause, appellant made a formal request in writing to counsel, to raise every ground appellant had in his case on this appeal. (SEE ENCLOSED LETTERS TO COUNSEL).

5. Appellant's counsel informed him that he had no intention on raising all the ground in his case, nor did he intend to file a supplemental brief to bring these grounds to the attention of the court. (SEE LETTER FROM COUNSEL ENCLOSED).

6. Appellant has no fewer than one hundred thirty (130) points that should have been raised in te brief filed by counsel of record. (SEE ATTACHMENTS HEREIN).

7. Appellate contends that he would have prepared a timely pro se brief, but appellate's attorney only gave him two days notice before the brief was due in this court.

8. Appellant further states that he has been denied meaningful access to the law library where he is confined for well over the past two months. Further, that there are no law clerk to assist death-row prisoners at this time with any legal pleading they wish to prepare.

9. Appellant is a layman in the field of law and has no legal training to assist him in preparing this motion or brief.

10. Appellant requests this court to consider and rule on the following as a supplemental brief in this case:

A) Appellant's Fist Amended 29.15 Motion.
B) Appellant's original (29.15) Motion.
C) Appellant's Motion For New Trial.
D) Appellant's Pro Se Motion For New Trial.
E) Appellant's Second Amended Motion Under Rule (27.26).
F) Appellant's exhibits herein.

11. It is not appellant's intend to hinder or delay disposition of this cause in any manner. It has taken the appellant this time since receiving the brief from counsel to find out just what affirmative steps appellant could take to have these issues preserved.

Wherefore, appellant prays this court allow him leave to file this supplemental brief, for the reason stated within this motion and for any other relief this court deems just and proper.

-- Signature --
Eric D. Clemmons

Eric D. Clemmons
Reg No. CP-56
Potosi Correctional Center (2-A-23
Route 2, Box 2222
Mineral Point, MO 63660

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 10 day of Jan., 1990, to:

Office of Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

-- Signature --

Eric D. Clemmons
Reg No. CP-56
Potosi Correctional Center (2-A-23)
Route 2, Box 2222
Mineral Point, Missouri 63660

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
Post Office Box 150
Jefferson City, Missouri
65102

January 23, 1990

Mr. Eric D. Clemmons
No. CP-56
Potosi Correctional Center
Route 2, Box 2222
Mineral Point, Missouri 63660

In re: Eric D. Clemmons vs. State of Missouri
Supreme Court No. 71535

Dear Mr. Clemmons:

Please be advised that the Court this day entered the following order in the above entitled cause:

"Appellant's pro se motion to file supplemental brief overruled."

Very truly yours,

THOMAS F. SIMON

Becky Judd
Deputy Clerk, Court en banc

cc: Henry Robertson
Attorney General

No. 97-1159

Supreme Court, U.S.
FILED
MAR 13 1998
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

v.

ERIC CLEMMONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RECEIVED
MAR 17 1998
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SUPREME COURT, U.S.

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No. 97-1159

Supreme Court, U.S.
FILED
MAR 13 1998
CLERK

IN THE
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OCTOBER TERM, 1997

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

v.

ERIC CLEMMONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

RECEIVED
MAR 17 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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No. 97-1159

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,
Petitioner,

v.

ERIC CLEMMONS,
Respondent.

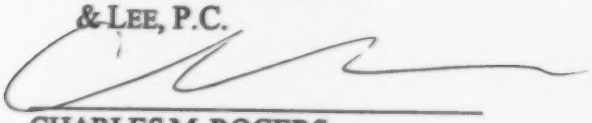
ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

COMES NOW Eric Clemmons, Respondent herein, and moves this Honorable Court for leave to proceed *in forma pauperis* herein pursuant to Rule 39. Leave was granted allowing Respondent to proceed *in forma pauperis* in the United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit. Counsel was appointed to represent Mr. Clemmons under the Criminal Justice Act, Title 18, United States Code, Section 3006A.

Respectfully submitted,

WYRSCH HOBBS MIRAKIAN
& LEE, P.C.

By: 

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A CLAIM IS "FAIRLY PRESENTED" TO THE STATE COURT WHEN INCLUDED IN *PRO SE* PLEADINGS FILED IN THAT COURT IN THE ABSENCE OF ANY REGULARLY APPLIED PROCEDURAL RULE PROHIBITING SUCH PLEADINGS.

II.

WHETHER RESPONDENT'S RIGHTS TO DUE PROCESS AND CONFRONTATION WERE VIOLATED WHEN THE TRIAL COURT ADMITTED THE DEPOSITION TESTIMONY OF A KEY PROSECUTION WITNESS WHEN THAT WITNESS NEVER TESTIFIED AT TRIAL, RESPONDENT HAD NO OPPORTUNITY TO ATTEND THE DEPOSITION, AND RESPONDENT DID NOT WAIVE HIS RIGHT TO CONFRONT THE WITNESS.

III.

WHETHER THIS CASE IS AN APPROPRIATE VEHICLE FOR DETERMINING THE CORRECT STANDARD FOR HARMLESS ERROR ANALYSIS WHEN THIS ISSUE WAS NEVER RAISED IN THE COURT OF APPEALS AND THE VIOLATION OF RESPONDENT'S RIGHTS UNDER THE CONFRONTATION CLAUSE CANNOT BE CONSIDERED HARMLESS UNDER EITHER STANDARD.

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Reasons for Denying the Writ

I. Respondent "fairly presented" his claims to the state appellate court when he raised them in a *pro se* pleading after his attorney failed to comply with his explicit directions; Respondent also raised the same claim in his federal habeas proceeding as he raised in his *pro se* motion for new trial. 12

II. Respondent's constitutional right to confront his accuser was violated when the trial court admitted the deposition testimony of a key prosecution witness when that witness never testified at trial, Respondent had no opportunity to attend the deposition, and Respondent did not waive his right to confront the witness. 18

III. This case is not an appropriate vehicle for determining the correct standard for harmless error analysis conducted by a federal habeas court when the state court never conducted a harmless error analysis because petitioner never raised this issue in the court of appeals, the violation of Respondent's rights under the confrontation clause cannot be considered harmless error under either standard and because Petitioner does not even assert that respondent's Brady claim is harmless error. 24

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OPINIONS BELOW

Respondent adopts Petitioner's citation of the opinions below.

JURISDICTIONAL STATEMENT

Respondent adopts Petitioner's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent adopts Petitioner's statement of constitutional and statutory provisions. In addition, Article I, Section 18(b), of the Missouri Constitution provides:

> Upon a hearing and finding by the circuit court in any case wherein the accused is charged with a felony, that it is necessary to take the deposition of any witness within the state, other than defendant and spouse, in order to preserve the testimony, and on condition that the court make such orders as will fully protect the rights of personal confrontation and cross-examination of the witness by defendant, the state may take the deposition of such witness and either party may use the same at the trial, as in civil cases, provided there has been substantial compliance with such orders. The reasonable personal and traveling expenses of defendant and his counsel shall be paid by the state or county as provided by law.

STATEMENT OF THE CASE

Respondent essentially agrees with Petitioner's summary of the procedural history of this case although, as discussed below, he disputes Petitioner's description of the Eighth Circuit's opinion upon rehearing. After Respondent's conviction and death sentence were affirmed on direct appeal, Respondent unsuccessfully pursued post-conviction relief under Missouri Supreme Court Rule 29.15. During the 29.15 hearing, Petitioner testified about his attorney's failure to notify him of the deposition of a key prosecution witness, Captain Gross. Petitioner further testified that he was unaware of Gross' testimony until it was read into the record at trial. Respondent's testimony at the 29.15 hearing established that he did not consent to the taking of the deposition in his absence and, further, did not consent to its use at trial in violation of his right to confrontation.

In his federal petition for writ of habeas corpus, filed in the United States District Court for the Western District of Missouri, Petitioner pursued a number of claims. The District Court denied his petition, but noted that he had presented particularly strong claims concerning: (1) a violation of Brady v. Maryland, 373 U.S. 83 (1963), which involved the State's failure to turn over an investigative memorandum that summarized an eyewitness account in which another inmate, not Clemmons, was named as the perpetrator; and (2) a violation of the right to confrontation based on the introduction at trial of the deposition testimony that was taken in Respondent's absence

and which was used at trial without Respondent's consent or his knowing, voluntary, and intelligent waiver of his right to confrontation. The District Court ruled that both of these claims were procedurally barred. However, it held that absent a procedural bar, both of the claims appeared to be meritorious and would warrant the granting of the writ. See Clemmons v. Delo, Case No. 90-0943-CV-W-6 (W.D. Mo., July 7, 1995), A-57, A-66, A-75.[1]

The District Court denied relief, in part, because it failed to recognize that Mr. Clemmons had testified in his Rule 29.15 hearing that he was unaware of the deposition until it was read into the record and had not consented to the taking of the deposition or its admission at trial. The District Court stated: "No record was made during petitioner's testimony at the hearing that he had not been given an opportunity to be present during the Gross deposition." A-67. This misperception of the record persisted through the first opinion in the Eighth Circuit Court of Appeals, in which the appellate court affirmed the district court's denial of relief. Following that decision, Respondent changed counsel, and undersigned counsel was appointed. The Court of Appeals granted rehearing, and on August 28, 1997, filed a new opinion which vacated its earlier order of November 22, 1996. In the opinion issued following rehearing, the Court of Appeals noted that its earlier reading of the record had been incorrect.

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[1]All references to "A-__" are to Petitioner's Appendix, filed with the Petition for Writ of Certiorari.

Petitioner erroneously states in his statement of the case that: "Respondent, through counsel, declined to attend the deposition." See Petitioner's Petition at 4. This statement is directly contrary to uncontradicted testimony of Respondent at the Rule 29.15 hearing. Significantly, Petitioner's assertion is directly contrary to the Court of Appeals' opinion, which states:

> Clemmons testified at the 29.15 hearing that he had not known that his lawyer had taken a deposition of Captain Gross, and that he did not find out about the deposition until trial, when the prosecutor was discussing the introduction of the transcript with the judge. There is no evidence to the contrary in the record.

See A-26.

In its opinion issued after rehearing, the Court of Appeals determined that Petitioner had properly asserted and preserved all of his claims to the fullest extent of his ability in state court. The Court of Appeals acknowledged that in the appeal from the denial of the Rule 29.15 motion, appointed counsel had failed to raise certain issues on appeal. However, the Court noted that Mr. Clemmons had preserved his claims by first instructing his lawyer to raise them and, upon finding that counsel had not raised them, by instructing his counsel to file a supplemental brief. When counsel refused to file a supplemental brief with the additional points, Respondent then filed a motion for leave to file a *pro se* brief which listed in an attachment an additional 130 proposed claims that had been raised in the Rule 29.15 proceeding. The Missouri Supreme Court denied Respondent's request to file the *pro se* brief. The Court of Appeals

observed that the client always remains the master of his action, and that Respondent in this case had done all that he could to raise and preserve his claims, including stating those claims in his *pro se* pleading. Under the particular circumstances of this case, the Court of Appeals found that Respondent was not procedurally barred from raising his claims in federal court.

Petitioner filed a petition for rehearing by the Court of Appeals, which was denied by the court. Petitioner then filed the present petition for writ of certiorari.

Regarding Petitioner's statement of the factual background, Respondent asserts that Petitioner's rendition of the facts is highly selective and misleading on a number of points. For instance, the factual statement fails to acknowledge the significant doubt that surrounds Thomas Steigerwald's identification of Respondent as the assailant. The lighting in the prison yard after dark was poor, Steigerwald could not see the assailant's face at the time of the perceived assault, and a number of inmates identified another inmate, not Respondent, as the perpetrator. Significantly, the State had failed to turn over an investigative memorandum summarizing an interview with an eyewitness shortly after the event in which the witness had identified another person, not Respondent, as the perpetrator. A fuller statement of the factual history of this case follows:

On August 7, 1985, shortly before 9:00 p.m., several inmates had congregated in groups on the lawn near Housing Unit Three at the Missouri State Penitentiary in

Jefferson City, Missouri. Present at that time were inmates Henry Johnson, Fred Bagby, Justice Mays, Seymour Abdullah, Keith Brown, Wilbur Lewis, and Eric Clemmons among others. Johnson, who had a reputation for harassing inmates at the institution, was stabbed at that time and died shortly thereafter.

Three inmates present at the time of the stabbing, Mays, Abdullah, and Brown, testified at trial that Johnson physically assaulted Bagby and that Bagby then stabbed Johnson with a knife that Bagby had been carrying concealed under his clothing. These same inmates testified that Johnson took off running after the incident and that Johnson ran into Clemmons as Johnson was fleeing the scene in search of medical attention.

At the time of the incident, Corrections Officer Thomas Steigerwald was in the process of exiting the main corridor and proceeding to the upper lawn area when he noticed the commotion near Housing Unit Three. Steigerwald testified that he observed one inmate grab another, strike him in the chest, and then hit him with a roundhouse punch in the side.

Inmate Johnson then ran past Steigerwald, and Steigerwald saw that the front of Johnson's shirt and pants had blood on them. Steigerwald then radioed for help. Later, it was determined that Johnson had been stabbed with a flat-bladed instrument.

At trial, Steigerwald testified that Johnson's assailant was wearing a grey sweatshirt although he could not make out the assailant's face. Steigerwald agreed that the lighting conditions at the time of the stabbing could be described as "dark."

After radioing for help, Steigerwald followed two inmates who had started toward the prison's chapel. One of the inmates was wearing the grey-type sweatshirt and the other inmate wore a grey towel on his head. Steigerwald testified that he saw the two inmates' faces when they subsequently separated near the prison's chapel. The inmate in the grey sweatshirt was later identified by Steigerwald as Eric Clemmons and the other inmate was identified as Keith Brown.

Steigerwald testified that he got a brief glimpse of a knife in Clemmons' hand at the time the inmates separated. Steigerwald admitted that he just saw a flash of metal and did not see a knife handle. Clemmons wore metal-rimmed glasses, but he did not have the glasses on at the time that Steigerwald saw Clemmons. Subsequently, when Steigerwald caught up with Clemmons, Clemmons had his glasses in his hand and he was wearing a grey sweatshirt inside-out.

Clemmons did not have a knife in his possession. Although an extensive search was conducted, a knife was never found. Clemmons' sweatshirt had small, light smears of untypeable blood on the grey, right-side-out side of the sweatshirt. There was no testimony to show the blood was fresh. Clemmons was taken into custody without resistance and cooperated with investigators.

Clemmons and Johnson had previously been cellmates, but Clemmons had been allowed to relocate because Johnson had harassed Clemmons.[2] Clemmons told the intervening officer that the relocation would solve any problem he had with Johnson, and no problems were evident to the officer after the relocation. Clemmons denied that he had taken any part in the stabbing of Johnson.

The other inmate seen leaving the area with Clemmons, Brown, was later identified and his cell was searched. A hat and a book were found in Brown's cell. The book contained school work papers with Clemmons' name on them. A guard later testified that he thought he saw blood on the book. However, a serologist who testified found no traces of blood on the textbook. The hat had blood on it of type B or AB. Johnson's blood was type B. No testimony was presented to tie Clemmons to the hat.

The autopsy on Johnson revealed that he had been stabbed three times, once to his left side, once under his right arm, and once in the left side of his chest which penetrated Johnson's heart and was the fatal blow. Before Johnson died, Johnson said "they have stuck me in my heart."

Aside from Steigerwald's after-dark observations and the blood evidence, which was not inconsistent with defense testimony that Johnson ran into Clemmons, the primary evidence against Clemmons came through the testimony of a prosecution

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[2]Johnson's harassment, however, was not exclusive to Clemmons. Johnson had a reputation for the "conquest of other men in homosexual pursuits."

witness, Captain A.M. Gross, who was not even present at trial. With no objection from defense counsel, a deposition of Captain Gross was read into the record. Apparently, Gross' wife had just passed away, and the deposition was taken to allow Captain Gross to attend to family matters.

The deposition transcript reflects, and Clemmons' later testimony confirms that Clemmons was not present for the deposition and was not even aware that the deposition had been taken. In testimony at his Rule 29.15 hearing, Clemmons stated that he was unaware of the contents of the deposition until the deposition was read in open court.

Clemmons' ignorance of Captain Gross' testimony is particularly significant because Gross testified that Clemmons made an inculpatory admission to him, stating: "I guess they got me." At his 29.15 hearing, Clemmons expressed his surprise:

> [W]ell, I didn't find that out [regarding the purported admission] until after they was reading it into the record in front of the jury and said this. That's when I found out I was supposed to have made that statement.

No waiver of Clemmons' right to confrontation appears in the trial record. The deposition was simply read into evidence with no objection from Clemmons' counsel. Clemmons later asserted the violation of his right to confrontation in his motion for new trial and in several subsequent pleadings or proceedings, including a motion to

recall the mandate in the Missouri Supreme Court and in the state post-conviction proceedings.

Even though Clemmons had firmly maintained his innocence to all of the other corrections officers who spoke to him, Gross testified that Clemmons spontaneously volunteered the statement "I guess they got me" with absolutely no questioning or prompting. Clemmons allegedly made this statement the morning after the stabbing, at approximately 9:00 a.m.

Significantly, in his state and federal evidentiary hearings, Clemmons testified that if he had been present at the deposition and able to assist his counsel, then he could have drawn his counsel's attention to prison logs, later destroyed, which would have shown that he was not in Gross' presence at the time he supposedly made the inculpatory statement. In addition, Gross failed to note Clemmons' alleged inculpatory statement in the report he prepared on Johnson's stabbing.

The belated disclosure of Clemmons' alleged statement was coupled with the prosection's failure to turn over exculpatory evidence gathered by Captain Gross. Shortly after the stabbing, Gross had spoken to an inmate named Dwight Clark. Mr. Clark told Gross that he saw Fred Bagby stab Johnson. Gross reported Clark's statement in an interoffice investigative memorandum. However, the prosecution apparently failed to disclose this document to the defense.

According to testimony at the 29.15 hearing, Clemmons did not obtain this exculpatory memorandum until after the trial concluded. Even though three other inmates testified that Bagby, not Clemmons, had stabbed Johnson, the suppression of the Gross memorandum was highly significant because it undermined a key prosecution claim, namely, that the defense waited until after Bagby's death to accuse Bagby.

Bagby had died prior to Clemmons' trial, and the prosecution referred to him at trial as "conveniently dead." Dwight Clark, however, had named Bagby as the perpetrator within thirty minutes or so of the stabbing. Clark's statement to Gross, had it been properly disclosed, would have prevented the State from suggesting that the defense account of the killing was a recently concocted tale designed to blame someone who could not dispute his guilt.

REASONS FOR DENYING THE WRIT

I.

RESPONDENT "FAIRLY PRESENTED" HIS CLAIMS TO THE STATE APPELLATE COURT WHEN HE RAISED THEM IN A *PRO SE* PLEADING AFTER HIS ATTORNEY FAILED TO COMPLY WITH HIS EXPLICIT DIRECTIONS; RESPONDENT ALSO RAISED THE SAME CLAIM IN HIS FEDERAL HABEAS PROCEEDING AS HE RAISED IN HIS *PRO SE* MOTION FOR NEW TRIAL.

In his first argument, Petitioner: (1) mischaracterizes the holding of the Eighth Circuit Court of Appeals, (2) inaccurately describes the exculpatory investigative report underlying Respondent's Brady claim; and (3) fails to address the fact that Respondent preserved his claims by giving explicit directions to his court-appointed attorney and by notifying the appellate court of his claims in a motion for leave to file a supplemental brief. Contrary to Petitioner's argument, the Court of Appeals did not craft a "close enough" exception to the procedural default doctrine. Respondent's argument was the same in his federal habeas proceeding as it was in his *pro se* motion for new trial. Further, the Court of Appeals properly recognized that Respondent did all that he could to raise and preserve his claims and that there was no regularly followed procedural rule that barred the filing of a *pro se* supplemental brief.

The opinion of the Court of Appeals properly notes that as to major issues, the client "remains the master of his cause." The Court of Appeals stated:

> The fact remains that Clemmons called the attention of the Missouri Supreme Court to his Brady claim, among many others. We do not know what else he could have done, as a practical matter to present the claim to that court for decision on the merits. We therefore hold that the claim is fairly presented, and that the merits are now open for decision on federal habeas corpus.

See A-10, A-11.

Respondent asserts that he sufficiently presented his Confrontation Clause claim to the Missouri Supreme Court when he instructed his 29.15 appellate counsel to raise that issue and moved to file his own *pro se* brief incorporating pleadings that raised that issue.

The procedural default rule is based on principles of comity and federalism. If the state court ruling is made upon the basis of a state procedural rule, there may be a state law basis adequate to support the ruling independent of the federal constitutional claim. See Coleman v. Thompson, 501 U.S. 722 (1991). However, ". . .an adequate independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied." Ford v. Georgia, 498 U.S. 411, 424 (1991) (quoting James v. Kentucky, 466 U.S. 341 (1984)). There is no indication whatsoever that the Missouri Supreme Court was relying on such a rule when it denied Mr. Clemmons leave to file a supplemental

pro se brief. In fact, the Missouri Supreme Court accepted a *pro se* brief from Respondent in his direct appeal. *Pro se* briefs have also been accepted by Missouri appellate courts in other cases. See, e.g., State v. Peterson, 518 S.W.2d 1, 2 (Mo. 1974) (acceptance of *pro se* brief by Missouri Supreme Court); see also Lamb v. State, 833 S.W.2d 9, 11 (Mo. Ct. App. 1992); McDonald v. State, 758 S.W.2d 101, 103 (Mo. Ct. App. 1988).

In other words, no procedural bar arose in Mr. Clemmons' 29.15 appeal because the denial of leave to file a *pro se* brief is not a state procedural rule that is "strictly or regularly adhered to." See Grubbs v. Delo, 948 F.2d 1459, 1462 (8th Cir. 1991), cert. denied, 506 U.S. 835 (1992).

In sum, because the Missouri Supreme Court does not have a rule prohibiting acceptance of *pro se* briefs, there is no state procedural rule that gives rise to a procedural bar in Mr. Clemmons' Rule 29.15 appeal. The absence of a procedural bar is underscored by the fact that Mr. Clemmons also raised the confrontation claim in his motion to recall the mandate in his 29.15 appeal. In his motion to recall the mandate, Mr. Clemmons explicitly referred to a *pro se* "addendum" which he filed in his Rule 29.15 proceeding. In his suggestions in support of his motion to recall the mandate, Mr. Clemmons specifically alerted the Missouri Supreme Court to the fact that he believed his 29.15 appeal counsel had performed in a deficient manner. Respondent stated:

> Mr. Robertson took it upon himself, against appellant's wishes and strong protests, to abandon all but six of the issues which were raised by a competent and licensed attorney at law in the original 29.15 proceedings in the circuit court. . .[A]s a result, appellant's right to be heard on other matters of greater importance has been compromised by Mr. Robertson's actions. . .

Respondent asserts that his *pro se* pleadings, coupled with his constant and explicit directions to his post-conviction attorney, were sufficient to preserve his claims for federal review. As the Court of Appeals correctly noted in its opinion, the client remains the "master of his cause." See A-9. When counsel in the 29.15 appeal ignored Clemmons' explicit directions and failed to brief the issues as requested by his client, Respondent "did the only thing he could do: he tried to bring the issue to the attention of the Missouri Supreme Court himself." See A-10. By denying Respondent leave to file a supplemental *pro se* brief, the Missouri Supreme Court, in effect, cut off access to the state forum.

Petitioner also argues -- frivolously -- that Mr. Clemmons did not "fairly present" his Confrontation Clause claim in his *pro se* motion for new trial because the motion for new trial merely complained that the submission of Officer Steigerwald's deposition at trial was "both unconstitutional and unnecessary in that the witness was not legally unavailable." Petitioner asserts, with no basis whatsoever, that the Eighth Circuit fashioned a "close enough" exception in order to find that Clemmons had raised the same claim in his *pro se* motion for new trial as he raised in the federal habeas

proceeding. In fact, the Eighth Circuit fashioned no such exception. Respondent's claim, as stated in his *pro se* motion for new trial, is as follows:

> The court denied defendant the right to confront his accusor [sic], when the court allowed the State to read to the jury and into evidence the deposition of Mr. Gross. Such conduct was unconstitutional and unnecessary in that this witness was not legally unavailable, and in fact could have been subpoenaed to testify. The aforestated further denied defendant effective assistance of counsel in that a number of material inconsistancies [sic] (police reports and other documents recording previous statements that were inconsistant [sic] and in direct conflict with the deposition) were discovered by the defendant after the taking of this witnesses deposition. Thus defendant was denied the opportunity to place before the jury witnesses inconsistant [sic] statements, and was denied the opportunity for the jury to observe demenour [sic] of this witness.

See A-25. This allegation by Respondent clearly stated a violation of the Confrontation Clause. *Pro se* pleadings must be liberally construed. Haines v. Kerner, 404 U.S. 519, 520 (1972). Clearly, Respondent "fairly presented" his claim in his *pro se* motion for new trial. Petitioner's argument to the contrary is wholly without merit and must be denied.

Finally, Respondent disputes Petitioner's characterization of the Brady evidence. Petitioner challenges the significance of an investigative memorandum, stating that it contained a report "of an eyewitness who did not see respondent's involvement in the crime." In fact, the eyewitness stated he saw the assault and named another individual, not Respondent, as the perpetrator.

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

II.

RESPONDENT'S CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSER WAS VIOLATED WHEN THE TRIAL COURT ADMITTED THE DEPOSITION TESTIMONY OF A KEY PROSECUTION WITNESS WHEN THAT WITNESS NEVER TESTIFIED AT TRIAL, RESPONDENT HAD NO OPPORTUNITY TO ATTEND THE DEPOSITION, AND RESPONDENT DID NOT WAIVE HIS RIGHT TO CONFRONT THE WITNESS.

Petitioner frivolously argues that:

> The Court of Appeals' decision assumes the existence of a Constitutional right to attend a pre-trial deposition that may not be waived by counsel's decision not to procure respondent's attendance at the deposition or by counsel's decision not to object to the deposition's admission into evidence at trial.

Petitioner's argument turns the law on its head and misrepresents the Eighth Circuit's opinion. The Court of Appeals' decision "assumes" nothing. The Court of Appeals considered and soundly rejected Petitioner's contention that Respondent did not have a constitutional right to attend a pretrial deposition which was used in lieu of trial testimony.

The Court of Appeals held that "far from being a 'new rule' of constitutional law," Petitioner's claim "presents a paradigmatic violation of the Confrontation Clause as it has been traditionally interpreted by the Supreme Court." See A-27. As noted by the Eighth Circuit:

> [Respondent was] denied the right to face-to-face confrontation with one of his two accusers. . ., the right to have the jury observe the witness' demeanor, the right to participate in the cross-examination of the witness, and the right to observe the witness against him, in short every single element of the right to confrontation.

A-29. The violation of the Confrontation Clause is so clear cut that it is not a transgression "about which reasonable jurists may disagree." Id.

Apparently, Petitioner is arguing that no constitutional violation occurred when Respondent was not informed of the deposition and, further, that no violation occurred when the deposition was read into the record at trial without any finding that Respondent had waived his right to confrontation.

This constitutional violation is especially glaring in light of the fact that a provision in the Missouri Constitution, Article I, Section 18(b), specifically limits the use of depositions in lieu of live testimony in criminal cases to those taken under court orders which fully protect the defendant's right to personal confrontation and cross-examination. The inadmissibility of the Gross deposition was well established in Missouri law at the time of Respondent's trial. See State v. Jackson, 495 S.W.2d 80 (Mo. Ct. App. 1973).

Petitioner attempts to distract and mislead this Court by suggesting that the Court of Appeals held that Respondent's rights were violated when he was not permitted to attend the pretrial deposition. In fact, the constitutional violation did not occur until the deposition testimony was read into evidence at trial. Had Captain Gross testified at

trial, his deposition would simply have been another pretrial discovery deposition without any constitutional significance. However, because the State relied upon the deposition in lieu of live testimony at trial (and, in fact, intended to so use it from the outset), Respondent's right to confrontation was violated in the most fundamental fashion.

The right to confront one's accuser is one of the most elemental of constitutional protections. The right to confrontation traces its roots to "the beginnings of western culture." Coy v. Iowa, 487 U.S. 1012, 1015 (1988). It is an "essential and fundamental requirement for the kind of fair trial" which our constitution requires. Pointer v. Texas, 380 U.S. 400, 405 (1965). The violation of the right to confrontation is such a fundamental, structural error that prejudice is presumed. Brookhart v. Janis, 384 U.S. 1, 3-4 (1966).

Because of the importance of the rights being relinquished, the prerequisites of a valid waiver of constitutional rights must be "spread on the record." Boykin v. Alabama, 395 U.S. 238, 242 (1969). The court must never presume waiver from a silent record. Id. at 242. If the record does not reflect a valid waiver, then there is no waiver, and the judgment must be reversed. See Brookhart, 384 U.S. at 4-8. The right to confrontation is a personal right and cannot generally be waived through the words or actions of one's attorney. Carter v. Sowders, 5 F.3d 975, 981-82 (6th Cir. 1993), cert. denied, 511 U.S. 1097 (1994). As noted by the Sixth Circuit, it is the

accused, not counsel, who "must be confronted with the witnesses against him." Id. at 981-82. Consequently, the right to defend "is given directly to the accused; for it is he who suffers the consequences if the defense fails." Id. at 982.

In the present case, the record is totally devoid of any indication of a waiver by Respondent. With no objection from defense counsel, the deposition of Captain Gross was read into the record. Apparently, Gross' wife had just passed away, and the deposition was taken to allow Captain Gross to attend to family matters. The deposition transcript reflects, and Respondent's later testimony confirms, that Respondent was not present for the deposition and was not even aware that the deposition had been taken.

Under these circumstances, the silent trial record establishes that no waiver was made of the right to confrontation by Respondent. Because the waiver must be clear and spread on the record, the Court of Appeals necessarily found that Respondent did not waive his right to confrontation. A violation of the right to confrontation involves such a fundamental, structural error that prejudice is presumed. Brookhart, 384 U.S. at 3-4. Nonetheless, it is important to note the extreme prejudice suffered by Respondent as a result of the use of the Gross deposition. Respondent's trial attorney learned of the supposed admission made by Respondent to Gross ("I guess they got me") only a couple of weeks before the trial, in violation of Missouri discovery rules. Respondent's attorney never informed Respondent of the statement before trial.

Further, as Respondent testified at the federal evidentiary hearing, it would have been impossible for him to make such an admission to Captain Gross at the time he supposedly did, as he was nowhere in the vicinity of Captain Gross at that time. Had Respondent been present at the deposition, he could have assisted his attorney in conducting a more effective cross-examination of Gross. He also could have directed his attorney to obtain movement logs and other documents (which were later destroyed) which would have shown that Gross did not have access to Respondent at the time he made the supposed admission, "I guess they got me."

It is difficult to imagine a more straightforward violation of the right to confrontation than the one which occurred here. There is simply no basis whatsoever to claim that the Court of Appeals relied on a "new rule" of law and applied it retroactively in a habeas proceeding. Petitioner's argument is baseless.

Petitioner also attempts to argue that the admission of the deposition testimony did not violate the right the right to confrontation because Captain Gross was an unavailable witness and the testimony was sufficiently reliable. In fact, there was no showing whatsoever that Captain Gross was unavailable within the meaning of the Sixth Amendment. Moreover, the testimony was presumptively unreliable because, in this instance, counsel conducted the cross-examination without the aid of the defendant. Moreover, the defendant was deprived of physical confrontation, and the jury had no

opportunity to observe the demeanor of the witness. Under these circumstances, the right to confrontation was clearly violated.

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

III.

THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR DETERMINING THE CORRECT STANDARD FOR HARMLESS ERROR ANALYSIS CONDUCTED BY A FEDERAL HABEAS COURT WHEN THE STATE COURT NEVER CONDUCTED A HARMLESS ERROR ANALYSIS BECAUSE PETITIONER NEVER RAISED THIS ISSUE IN THE COURT OF APPEALS, THE VIOLATION OF RESPONDENT'S RIGHTS UNDER THE CONFRONTATION CLAUSE CANNOT BE CONSIDERED HARMLESS ERROR UNDER EITHER STANDARD AND BECAUSE PETITIONER DOES NOT EVEN ASSERT THAT RESPONDENT'S BRADY CLAIM IS HARMLESS ERROR.

Petitioner asserts that certiorari is appropriate in this case to resolve a conflict in the Circuits on what standard of review should be applied for harmless error when the state court did not conduct a harmless error review -- the "substantive and injurious effect" standard of Brecht v. Abrahamson, 507 U.S. 619 (1993), or the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967). Petitioner distinguishes Orndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993), from cases in the Fourth, Seventh, Tenth, and Eleventh Circuits. However, Petitioner never questioned Orndorff in the Court of Appeals. Moreover, a fair reading of the opinion below reveals a proper application of the principles set forth in O'Neal v. McAninch,

513 U.S. 432 (1995). Furthermore, any conflict need not be resolved in this case, since Petitioner does not assert harmless error under either standard with regard to Respondent's claim that exculpatory evidence was withheld in violation of Brady v. Maryland, 373 U.S. 83 (1963).

It is axiomatic that, when a litigant fails to raise a challenge in a timely fashion or concedes an issue below, it cannot be raised in later proceedings. See, e.g., Steagald v. United States, 451 U.S. 204, 208-09 (1981); Pembaur v. City of Cincinnati, 882 F.2d 1101, 1106 (6th Cir. 1989); United States v. Morales, 737 F.2d 761, 763 (8th Cir. 1984). Petitioner now asserts that the Court of Appeals incorrectly applied the harmless beyond a reasonable doubt standard of Chapman v. California, 386 U.S. 18 (1967), to the violation of Respondent's Sixth Amendment rights under the Confrontation Clause. Petitioner asserts that the Court of Appeals rather should have applied the "substantive and injurious effect" standard of Brecht v. Abrahamson, 507 U.S. 619 (1993). However, in the Court of Appeals, Petitioner did not distinguish between these two standards. Rather, Petitioner argued below:

> Furthermore, [Clemmons] fails to demonstrate any prejudice. As the district court correctly noted, "the state can plausibly assert that the deposition would probably gone off as it did even if petitioner had been present." [Citation omitted.] The district court, however, held that this was "surely unknowable, and contrary to the psychological theory behind the confrontation clause." [Citation omitted.] The "unknowable" does not meet the harmless error analysis set forth in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), or Brecht v. Abrahamson, ___ U.S. ___, 113 S. Ct. 1710, 126 L. Ed. 2d 353 (1993).

Supplemental Brief of Appellee at 20.

In the conclusory paragraph to point one of his supplemental brief, Petitioner went on to assert, "Moreoever, [Clemmons] fails to demonstrate that the error was not harmless." Id. No other discussion concerning the proper standard to be applied in conducting harmless error analysis appears in Petitioner's briefs in the Court of Appeals. This Court should not grant certiorari to resolve an issue that was not properly presented to the court below.

In O'Neal v. McAninch, 513 U.S. 432 (1995), this Court verified the holding of Brecht. Brecht has been read as placing upon the habeas petitioner the burden of showing that claimed constitutional error was not harmless (an erroneous reading reflected in Petitioner's argument. In O'Neal, this Court made it perfectly clear that, "when a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless." O'Neal, 513 U.S. at 436. In this context, the opinion of the Court of Appeals clearly reflects such grave doubt:

> We do not know whether Captain Gross's testimony would have been different nor do we know to what extent it might have been different had Mr. Clemmons been notified and allowed to be present. That is, however, exactly the point. The burden is on the State here to show harmlessness, and it cannot do so.

A-31.

Although the Court of Appeals discussed this issue in terms of the Chapman standard, it is clear that had it applied the Brecht standard, it would have reached the same conclusion.

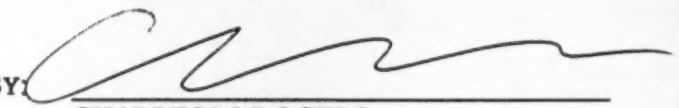
Significantly, Petitioner makes no assertion that the State's failure to disclose Captain Gross' memorandum memorializing Dwight Clark's identification of Fred Bagby as the perpetrator of the murder constituted harmless error. As the Court of Appeals held, and as Petitioner apparently concedes, Respondent is entitled to relief on this claim absent any procedural bars. Since the holding of the Court of Appeals may be upheld on the Brady claim without reaching the Confrontation Clause claim and certainly without reaching the issue of the standard of harmless error review concerning the Confrontation Clause claim, the philosophy of judicial restraint militates against granting certiorari to decide the non-issue regarding the proper standard for harmless error review.

The question presented in Part III of the Petition for Writ of Certiorari was not presented to the Court of Appeals. It is clear from the opinion below that the Court of Appeals would not have found denial of Respondent's Confrontation Clause rights harmless under either standard. Moreover, Respondent is entitled to relief on his Brady claim, which Petitioner concedes is not harmless error. For these reasons, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests this Court deny Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and confirm the judgment of that Court.

Respectfully submitted,

BY: 

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